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In the

Supreme Court of The United States

October Term, 1974

No. 74-227

In the Matter of the Application of
EDWARD LECCI, on behalf of Himself and All Others Similarly Situated, *Petitioner-Petitioner*

— against —

ARTHUR LEVITT, as Comptroller of the State of New York and Administrator of the New York State Policemen's and Firemen's Retirement System, *Respondent-Respondent*

In the Matter of the Application of
DANIEL GREENWALD, Individually and as Representative of the Nassau County Patrolmen's Benevolent Association, *Plaintiff-Petitioner*

— against —

ARTHUR LEVITT, as Comptroller of the State of New York and Administrator of the New York State Policemen's and Firemen's Retirement System, *Defendant-Respondent*

In the Matter of
JOSEPH WEBER, on Behalf of Himself and All Others Similarly Situated, *Petitioner-Petitioner*

— against —

ARTHUR LEVITT, as Comptroller of the State of New York and Administrator of the New York State Policemen's and Firemen's Retirement System, *Respondent-Respondent*

Petition for a Writ of Certiorari to the Court of Appeals for the State of New York

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Section 431 of the Retirement and Social Security Law of the State of New York ..... Ex. "CC"

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Petition for a Writ of Certiorari to the Court of Appeals for the State of New York

Petitioner-Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the State of New York entered on June 6, 1974.

Citations To Opinions Below

The opinions of Special Term, Supreme Court, County of Albany, State of New York are set forth herein as exhibits "F", "R", and "Y", it appearing that *Lecci v. Levitt*, 71 Misc. 2d 1091, 337 N.Y.S. 2d 861 (1972) was the only case cited in the reports as best as council can determine. The decision out of the Supreme Court, Appellate Division, Third Judicial Department by the Honorable Justice Greenblott appears as Exhibit "I" and is reported at 41 A.D. 2d 452, 344 N.Y.S. 2d 381 (1973). The decision from the Court of Appeals of the State of New York appears as exhibit "L", and as yet, has not been reported.

Jurisdiction

The judgment of the Court of Appeals was entered on June 6, 1974. The Court of Appeals by its action denied Petitioner-Petitioner's motion for leave to appeal thereby exhausting Petitioner-Petitioner's state remedies.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257 (3).

The Questions Presented

Whether Section 302, Subsection (9) (b) of the Retirement and Social Security Law of the State of New York, as interpreted by Arthur Levitt, Comptroller of the State of New York, and Administrator of the New York State Policemen's and Firemen's Retirement System, as applicable to Petitioner-Petitioner, Ed Lecci, is legal and valid and not in violation of the due process guarantees of the United States Constitution. Additionally, with regard to Petitioner-Petitioner, Daniel Greenwald, there is raised the issue of whether or not Section 431 of the Retirement and Social Security Law of the State of New York as applicable to Plaintiff-Petitioner Greenwald, and as inter-

preted by Defendant-Respondent, Arthur Levitt, is legal and valid and not in violation of the due process guarantees of the United States Constitution. As to Petitioner-Petitioner, Joseph Weber, there is raised the issue of whether or not, as a result of Respondent-Respondent's actions, Petitioner-Petitioner's due process guarantees under the United States Constitution have in fact been violated as well as his guarantees under Article V, Section 7 of the New York State Constitution.

Constitutional Provisions, Statutes, Rules, Etc., Involved

The Constitutional provisions involved herein are the due process guarantees as set forth in the Fifth and Fourteenth Amendments to the United States Constitution, and Article V, Section 7 of the New York State Constitution. Statutory provisions involved herein are Section 302 (9) (b) of the Retirement and Social Security Law of the State of New York; and Section 431 of the Retirement and Social Security Law of the State of New York. These provisions are set forth in Appendix.

Introduction

It should be noted that this Petition for a Writ of Certiorari relates to three (3) cases which, although independently instituted, were treated by the lower Appellate Courts as raising similar issues and therefore were decided together in a common decision. In view of the above, a common Writ of Certiorari is herein sought with regard to each of the three (3) cases set forth above.

The Lecci Case

This Writ of Certiorari is being sought from a decision of the Court of Appeals of the State of New York, dated June 6, 1974, the text of which is set forth herein as Exhibit "L".

Statement

Initially, the proceedings instituted herein by Petitioner-Petitioner were pursuant to Article 78, and were initiated by an Order to Show Cause with an accompanying Petition, said Order to Show Cause having been signed by the Hon. Edward S. Conway, Justice of the Supreme Court of the State of New York, County of Albany, and dated October 4, 1971, the text of said Order to Show Cause and accompanying Petition being set forth herein as Exhibit "A".

Respondent-Respondent, on papers dated November 4, 1971, brought a Motion seeking to have Petitioner-Petitioner's action dismissed, the text of said motion papers being set forth herein as Exhibit "B".

An Order dated February 14, 1972, signed by the Hon. John H. Pennock, denied Respondent-Respondent's Motion and directed that Respondent-Respondent serve an answer upon Petitioner-Petitioner the text of said Order being set forth herein as Exhibit "C".

On March 29, 1972, the Respondent-Respondent served its Answer upon Petitioner-Petitioner and in response thereto, on April 10, 1972, Petitioner-Petitioner served upon Respondent-Respondent an Order to Show Cause seeking to have Respondent-Respondent's Answer stricken, as well as have granted on Petitioner-Petitioner's behalf, Summary Judgment, the text of both pleadings being set forth herein as Exhibits "D" and "E" respectively.

On July 25, 1972, the Hon. John T. Casey rendered a memorandum decision based upon the issues raised by the above referenced pleadings wherein the relief demanded by the Petitioner-Petitioner, namely, to have an Order granted striking out Respondent-Respondent's answer

directing the entry of summary judgment in favor of Petitioner-Petitioner and against Respondent-Respondent was denied, the text of said decision being set forth herein as Exhibit "F".

An Order dated August 11, 1972, based upon the July 25, 1972, memorandum decision of the Hon. Justice John T. Casey was entered August 16, 1972 the text of which is set forth herein as Exhibit "G".

On August 23, 1972, Petitioner-Petitioner appealed to the Appellate Division of the New York Supreme Court, Third Judicial Department, the decision by the Honorable Justice John T. Casey, a copy of said Notice of Appeal being set forth herein as "Exhibit H".

In an opinion by the Honorable J. Greenblott, dated May 31, 1973, the Appellate Division of the Supreme Court in and for the Third Department, affirmed the lower court's determination, the text of said opinion being set forth herein as Exhibit "I". An Order dated June 7, 1973, was entered in the Clerk's Office of the County of Albany of the State of New York reflecting the Appellate Division's determination, the text of which is set forth herein as Exhibit "J".

On July 3, 1973, Petitioner-Petitioner sought to appeal the Appellate Division's determination by bringing a motion before the Court of Appeals for leave to appeal thereto said Appellate Division's determination. On September 19, 1973, the Court of Appeals of the State of New York granted Petitioner-Petitioner's motion for leave to appeal, the text of said Order being set forth herein as Exhibit "K".

On June 6, 1974, the Court of Appeals for the State of New York affirmed the decision of the Appellate Division of the Supreme Court of the State of New York on the opinion of Mr. Justice Louis M. Greenblott, a copy of said memorandum decision is set forth herein as Exhibit "L".

Facts

The factual background upon which the Petitioner-Petitioner instituted the original proceedings and upon which the Writ of Certiorari is based is not in dispute. Petitioner-Petitioner was appointed to the Police Department of the County of Nassau on the 16th day of May, 1949, and retired therefrom on the 2nd day of January, 1971. Petitioner-Petitioner by virtue of the fact that he was a policeman employed by the Nassau County Police Department, a participating member in the New York State Policemen's and Firemen's retirement system, was a member of the New York State Policemen's and Firemen's retirement system and entitled to all the benefits thereunder.

A contract was entered into after several months of collective bargaining on the 8th day of March, 1971, between the Nassau County Policemen's Benevolent Association and the County of Nassau. The Nassau County Policemen's Benevolent Association was the recognized bargaining agent for all members of the Nassau County Police Department from the rank of Patrolmen to that of Detective Captain. The contract entered into on the 8th day of March, 1971, was negotiated pursuant to the Taylor Law and was made retroactive so as to have a binding effect upon all members of the bargaining unit who were employed by the Nassau County Police Department on or after January 1, 1971.

Petitioner-Petitioner was a patrolman in good standing in the Nassau County Police Department until the date of his retirement on January 2, 1971 and entitled to all the benefits of said contract. Pursuant to paragraph 7 (m) of the 1971 contract, Petitioner-Petitioner was entitled, upon retirement, to termination pay equivalent to three days pay per year for all years served with the Nassau County Police Department prior to his retirement. The text of paragraph 7 (m) is set forth below:

"7. *Employee Benefits*

m. Termination Pay. Upon separation from service, after twenty (20) years, for any reason, other than cause, or upon the death in service of any employee or upon retirement qualifying for either ordinary or accidental disability under the Retirement and Social Security Law of New York State, such employee or his legal representative, shall be entitled to cash payment for accumulated terminal leave computed on an entitlement basis of three (3) days for each year of completed service. On or after January 1, 1972 such entitlements shall be computed on the basis of four (4) days for each year of completed service. Year of completed service shall only include time served as a member of the Police Force of the County on a full pay status, while on a Military leave of absence pursuant to Section 243 of the Military Law of New York State and time actually credited toward retirement benefits for service during World War II as provided in Ordinance No. 298-1970. In addition, an employee or his legal representative entitled to cash payment for accumulated terminal leave, shall be paid in a lump sum the value of his accumulated and unused sick leave to the extent of fifty (50) percent thereof, but not to exceed a total of one hundred sixty-five (165) working days."

Petitioner-Petitioner served twenty-one and a half years with the Nassau County Police Department and was paid by the County of Nassau, upon his retirement, a lump sum cash termination payment calculated by multiplying the number of years served by three days a year. Additionally, pursuant to paragraph 7 (m) of said 1971 contract, Petitioner-Petitioner was entitled, upon retirement, to a maximum of 165 days pay for unused accumulated sick leave. Petitioner-Petitioner, upon retirement, was entitled to and was in fact paid by the County of Nassau for unused sick leave, an amount equivalent to 150 days pay.

Upon retirement, Petitioner-Petitioner was notified and his retirement allowance reflected in the checks that he received, that his "final average salary" upon which his retirement benefits were calculated under Section 302, Subsection (9) (b) of the Retirement and Social Security Law of the State of New York was computed to include only 3 21st of the termination pay received by Petitioner-Petitioner and none of the sick pay paid to him by the County of Nassau upon retirement.

Upon the realization that the computation of his retirement allowance excluded the amounts paid for termination pay and for unused sick leave, Petitioner-Petitioner made application pursuant to Section 374 of the Retirement and Social Security Law for a hearing for redetermination of his application for a re-computation under Section 385 (a) of the Retirement and Social Security Law of his service retirement allowance so as to have his "final average salary" under the "three year" retirement bill, upon which said retirement allowance is based, reflect the inclusion therein of first, the full amount paid to Petitioner-Petitioner upon retirement for termination pay, and second, to additionally reflect the inclusion therein of the full amount paid to Petitioner-Petitioner upon retirement for unused sick leave.

A hearing was held on August 13, 1971 as a result of Petitioner-Petitioner's said application. The Hon. Simon Silver presided as Hearing Officer. On September 8, 1971, the Hon. Simon Silver rendered his decision denying Petitioner-Petitioner's application for re-computation. On September 17, 1971 the Hon. Simon Silver published his "Findings of Fact" and "Conclusions of Law" with respect to his above referenced September 8, 1971 decision, copies of which appear as exhibits appended to Petitioner-Petitioner's original petition, which is set forth herein as Exhibit "A".

Then Petitioner-Petitioner, having exhausted his administrative remedies, brought by an Order to Show Cause, a motion seeking an order directing that the Respondent-Respondent comply with the definition of "final average salary" under Section 302, Subsection (9) (b) of the Retirement and Social Security Law and to have included in said term "final average salary" all compensation earned and paid during the computation period applicable to Petitioner-Petitioner and to have the Court direct that said definition does not exclude therefrom any form of termination pay or sick pay earned and paid during said computation period.

It is from an Order denying Petitioner-Petitioner the above relief that forms the original basis upon which the lower Court proceedings were based and which hereby forms the basis for the Writ herein sought.

Basis for Granting Writ as to Lecci

The basis for granting said Writ for and on behalf of Petitioner-Petitioner, Lecci, is, in the first instance that the lower courts erred in holding that includable in the term "final average salary," as applicable to Petitioner-Petitioner in computing his retirement allowance under Subsection 302 (9) (b) of the Retirement and Social Security Law of the State of New York, is a sum representative of termination pay that is calculated by multiplying the three (3) days per year figure by only a three (3) year term as opposed to multiplying said three (3) year pay per year figure by the total number of years actually worked by Petitioner-Petitioner, in the second instance, to allege error in the lower Court's holding that cash payments for unused sick leave paid to Petitioner-Petitioner upon retirement are not includable in said term "final average salary" under said Subsection 302 (9) (b) of the Retirement and Social Security Law of the State of New York; and, in the third instance, Petitioner-Petitioner respectfully submits

to this Court that error was committed in the lower Courts in that, by their decision, Petitioner-Petitioner's constitutionally guaranteed rights of "due process" under the 5th and 14th Amendments to the United States Constitution as they affect property rights, as well as Petitioner-Petitioner's constitutionally guaranteed rights against impairment of retirement benefits as set forth in Article V Section 7 of the New York State Constitution, have in fact been violated.

Lecci's Point I

It is Petitioner-Petitioner's first contention that Section 302, Subsection 9 (b) of the Retirement and Social Security Law of the State of New York entitles a retiree, such as Petitioner-Petitioner to have included in the term "final average salary" the full sum paid to him in the form of termination pay upon his retirement.

Initially, Petitioner-Petitioner wishes to state to this Court that there is agreement in principle between the Petitioner-Petitioner and the lower Courts in their holding that termination pay is properly includable in the term "final average salary" pursuant to Section 302 (9) (b) of the retirement and Social Security Law of the State of New York as applicable to Petitioner-Petitioner.

This agreement in principle ends, however, with regard to what portion of said termination pay is includable in said term "final average salary". The lower Courts held that only three (3) days pay per year multiplied by a three (3) year period was includable in the term, "final average salary", whereas Petitioner-Petitioner contends that such a holding is in error and that the full sum received as termination pay is includable in the term, "final average salary".

In support thereof, the Court's attention is respectfully drawn to the language of Subsection 302 (9) (b) of the Retirement and Social Security Law of the State of New York which reads as follows:

§302. Definitions.

The following words and phrases as used in this article shall have the following meanings unless a different meaning is plainly required by the context:

"9. Final average salary.

a. The average annual compensation of member for credited government service not exceeding his three years of credited government service immediately preceding his date of retirement.

b. In the case of a member having credit for three years or more of member service, such term shall mean his highest average annual compensation earned during any three consecutive years of member service for which he is credited, provided that a member by written request, filed with the comptroller prior to the effective date of retirement and in form satisfactory to the comptroller, may select any other period of three consecutive years of member service for which he is credited.

c. In the case of a member who:

(1) Served as a supervisor of a town when such town was not a participating employer, and

(2) Was paid for such services on a fee basis, and

(3) Upon the town's subsequently becoming a participating employer, has paid contributions to the policemen's and firemen's retirement system with respect to salary received for prior county services, such term shall mean, at the option of such member,

his average annual compensation, including such fees and salary, earned by him during any three consecutive years of service with such municipality selected by the applicant prior to the date of his retirement.

d. By the adoption, filing and approval, where required, of a resolution in the manner provided by section three hundred thirty or three hundred thirty one of this chapter, as the case may be, a participating employer may elect to provide that, during the period beginning May first, nineteen hundred seventy and ending July first, nineteen hundred seventy-three, "Final Average Salary" shall mean the regular compensation earned from such participating employer by a member during the twelve months of actual service immediately preceding the date of such employee's retirement, exclusive of any lump sum payments for sick leave, or accumulated vacation credit, or any form of termination pay; provided, however, if the compensation earned in said twelve months exceeds that of the previous twelve months by more than twenty percentum, the amount in excess of twenty percentum shall be excluded in the computation of final average salary; provided further, however, that the benefits computed pursuant to this paragraph shall be payable unless the member would otherwise be entitled to a greater benefit under other provisions of this subdivision, in which case such greater benefit shall be payable. The provisions of this paragraph shall apply only to employees of a participating employer who retire after May first, nineteen hundred seventy and after the effective date of the aforementioned election but prior to July first, nineteen hundred seventy-three."

Upon a comparative reading of Subsection 302 (9) (b) and 302 (9) (d), both of which set forth a definition for the term "final average salary" as it is to be applied towards an individual retiree retiring under the New York State Policemen's and Firemen's Retirement System, depending upon which of the two definitions a retiree elects to retire under, it becomes obvious that under Subsection 302 (9) (d), any sum paid for termination pay is to be excluded from the term "final average salary" whereas under Subsection 302 (9) (b), no such exclusionary wording exists and thus under any conceivable rule of statutory interpretation, one must conclude that termination pay is in fact included under Subsection 302 (9) (b's) definition of "final average salary".

As reinforcement of the above conclusion, it should also be noted by the Court that in 1970, the Legislature saw fit to amend Section 302, Subsection (9) of the Retirement and Social Security Law of the State of New York. Prior to said amendment, Section 302 consisted of Subsections (9) (a), (9) (b), and (9) (c), as set forth above. In 1970, the Legislature saw fit to add Subsection (9) (d) as set forth above. In so doing, the Legislature did not amend any of the pre-existing language set forth in Section 302, Subsections (9) (a), (9) (b), and (9) (c), but rather left said language intact and merely added the language of Subsection (9) (d).

As stated above, the language of Subsection 302 (9) (d) specifically excludes from the term "final average salary" any sum paid in the form of termination pay, but the Legislature in providing the specific exclusion under Subsection 302 (9) (d), saw fit not to specifically enunciate said exclusion under the definition of the term "final average salary" as set forth in Subsection 302 (9) (b). Thus, as previously stated, statutory interpretation, as well as Legislative intent dictate that under Subsection 302 (9) (b) of the Retirement and Social Security Law of the State of New York, there is included in the term "final average

salary" a sum representative of payment made in the form of termination pay. With regard thereto, it should additionally be pointed out to the Court that the Petitioner-Petitioner, Respondent-Respondent, and the lower Courts are all in agreement as to said conclusion, the only item of dispute being whether only a portion of said termination pay is included in said term "final average salary" under Subsection 302 (9) (b) of the Retirement and Social Security Law of the State of New York, or in the alternative, that said term, "final average salary", under Subsection 302 (9) (b) includes the entire amount earned upon retirement as termination pay.

As further evidence of the legislature's intent and as further reinforcement of Petitioner-Petitioner's conclusion that included in the term "final average salary", under Section 302 (9) (b) of the Retirement and Social Security Law of the State of New York, is a sum representative of the total amount paid to Petitioner-Petitioner upon retirement as termination pay, the legislature passed Section 431 of the Retirement and Social Security Law of the State of New York, effective April 1, 1972.

As will become more evident upon further review of this brief, Section 431 of the Retirement and Social Security Law of the State of New York is the subject matter, in and of itself, of one of the co-pending cases set forth herein, to wit, *Greenwald* v. *Levitt*. However, as stated above, it is the purpose at this point to refer to Section 431 merely as a means to determine the intent of the legislature with regard to the definition of "final average salary" as set forth in Section 302, subsection (9) (b).

Section 431 of the Retirement and Social Security Law of the State of New York reads as follows:

"*Salary base for computing retirement benefits*

In any retirement or pension plan to which the state or municipality thereof contributes, the salary base for the computation of retirement benefits shall in no event include any of the following earned or received, on or after April first, nineteen hundred seventh-two:

1. lump sum payments for deferred compensation, sick leave, accumulated vacation or other credits for time not worked.

2. any form of termination pay

3. any additional compensation paid in anticipation of retirement, or

4. that portion of compensation earned during any twelve months included in such salary base period which exceeds that of the preceding twelve months by more than twenty percentum."

As is readily apparent upon review of Section 431, the legislature specifically excluded from the term "final average salary" any sums paid upon retirement for termination pay, unused sick leave, payment for deferred compensation, payment for accumulated vacation or other credits for time not worked. Since Section 431 was passed by the legislature effective April 1, 1972, which was after the passage of Section 302, Subsection (9) (d), statutory interpretation, as well as legislative intent, dictate that the passage of Section 431 was directed to nullifying the effect of Section 302, Subsection (9) (b) of the Retirement and Social Security Law of the State of New York by excluding from the term "final average salary" as therein set forth, a sum representative of payment made in the form of termination pay and thus acknowledged the fact that the term "final average salary" as set forth in Section 302, Subsection (9) (b) did in fact include termination pay.

With the above in mind, the Court's attention is now drawn to the language of sub-paragraph 7 (m) of the collective bargaining agreement that defined for 1971, the employment relationship between the Petitioner-Petitioner and his employer, a participating member in the New York State Policemen's and Firemen's Retirement System, 1971 being the year in which Petitioner-Petitioner retired and Subsection 302 (9) (b) of the Retirement and Social Security Law of the State of New York with the view towards interpreting the language of each provision in light of the other as well as in the context of the facts and circumstances of the case currently before the Court.

Initially, the Court's attention is focused upon the wording of Subsection 302 (9) (b) which sets forth the applicable definition for the term "final average salary"; namely, " ... such term shall mean his highest average annual compensation earned during any three (3) consecutive years ..." Under said language, a retiree can select any consecutive three (3) year period, take the average of the annual compensation earned for said three year period, and have said average sum utilized as his "final average salary" for computing his retirement benefits.

In the lower Courts decisions it was reasoned that under Subsection 302 (9) (b), the term "annual compensation earned" was characterized by the definition of the term "annual compensation" as set forth in Subsection 302 (2) (a) of the Retirement and Social Security Law of the State of New Yor, and that accordingly, termination pay was earned at a rate of three (3) days per year, said payment being deferred or withheld until Petitioner-Petitioner actually retire, and that since Subsection 302 (9) (b) referred to the average annual compensation earned during a three consecutive year period, the Petitioner-Petitioner was only entitled to have included in the term "final average salary", pursuant to Subsection 302 (9) (b), a

sum representative of termination pay that was limited to a three (3) year per year figure multiplied by said three (3) year term.

The fallacy in this reasoning stems from the fact that it totally ignores consideration of the language of sub-paragraph 7 (m) of Petitioner-Petitioner's collective bargaining agreement in interpreting Subsection 302 (9) (b) of the Retirement and Social Security Law of the State of New York, and as will further be discussed, totally ignores the introductory language set forth in Section 302 of the Retirement and Social Security Law of the State of New York when Subsection 302 (2) (a) of the Retirement and Social Security Law of the State of New York is referred to in an attempt to interpret Subsection 302 (9) (b) of the Retirement and Social Security Law of the State of New York.

As is readily seen, the lower Courts concluded, contrary to the language of sub-paragraph 7 (m) of the collective bargaining agreement in existence at the time of Petitioner-Petitioner's retirement, that termination pay was earned on a year by year basis, and that the payment of same was "deferred or withheld until Petitioner-Petitioner had satisfied the other requirements of subparagraph 7 (m) of the collective bargaining agreement."

Upon review of sub-paragraph 7 (m) of Petitioner-Petitioner's collective bargaining agreement, it becomes obvious that entitlement to termination pay is not realized nor achieved by Petitioner-Petitioner nor does it vest nor is it earned by him until he fulfills the other specific conditions of said paragraph. In particular, the language of sub-paragraph 7 (m) states that:

> "Upon separation from service, after twenty (20) years, for any reason, other than cause, . . . such employee . . . shall be entitled to cash payment for

accumulated terminal leave computed on an entitlement basis of three (3) days for each year of completed service . . ."

As set forth above, sub-paragraph 7 (m) requires that before termination pay is earned by an employee, he must have completed at least twenty (20) years of service, retired from service and retire in good standing, that is, not be separated for cause. Until the above are accomplished, an employee has not "earned" the right to reveive termination pay. To claim that termination pay vests on a year by year basis and is accumulated until an individual "retires", as reason by the lower Court, is contrary to the language of sub-paragraph 7 (m). Certainly, it is not the intent nor the meaning of the language of sub-paragraph 7 (m) to have an employee, who terminates his employment after having served for more than twenty (20) years, but is separated from service "for cause", to have a valid claim for accumulated termination pay that supposedly vested on a year by year basis during the period of time in which said employee served in good standing.

In addition to the lower Courts failure to consider the language of sub-paragraph 7 (m) of Petitioner-Petitioner's collective bargaining agreement in interpreting the language of Subsection 302 (9) (b) of the Retirement and Social Security Law of the State of New York in the light of the facts and circumstances presented in this case, the Special Term's opinion which was upheld by the Appellate Division for the Third Department and affirmed by the Court of Appeals, misread the opinion of *Local 456 International Brotherhood of Teamsters* v. *Cortlandt*, 68 Misc. 2d 645, 327 NYS 2d 143 (1971), when it referred to said opinion as support for the conclusion that termination pay was earned on a year by year basis and deferred or withheld until actual retirement.

Upon review of the opinion rendered in 1971 by the Supreme Court for Westchester County in *Local 456 International Brotherhood of Teamsters v. Cortlandt*, *supra*, it becomes readily apparent that the main issue presented in that case was to determine whether or not pursuant to a collective bargaining agreement, a town could make payments directly to a trusted welfare fund for the purpose of providing medical benefits for the members of said union. The Court in its analysis, concluded that such payments were permitted and stated as an aside, the following:

> "The law has developed to the point where the courts of this State now recognize that when a municipality grants pensions, vacations or military leave, it is not conferring a gift on its employees but is [compensating] the employee as one of the [terms] and [conditions] of employment, in some cases withheld or deferred until the completion of continued and faithful service . . .". (Brackets indicate italics)

As can readily be seen from the above language, the Court specifically referred to pension, vacations and military leave as being the terms and conditions of employment which "in some cases" can be withheld or deferred until "the completion of continued and faithful service." Nothing is set forth therein which can serve as legal precedent for concluding that termination pay as defined in sub-paragraph 7 (m) of Petitioner-Appellant's collective bargaining agreement is to be considered earned on a year by year basis but deferred or withheld until actual retirement.

Another error committed by Special Term in its opinion which was upheld by and concurred in by the Appellate Division for the Third Department and affirmed by the Court of Appeals resulting in its holding against Petitioner-Petitioner, was the lower Courts misapplication of Subsection 302 (2) (a) of the Retirement and Social Security Law of the State of New York to its analysis of Subsection 302 (9) (b) of the Retirement and Social Security Law of the State of New York under the facts and circumstances of this case.

Subsection 302 (2) (a) sets forth a definition for the term "annual compensation," said term additionally appearing in the language of Subsection 302 (9) (b). In referring to Subsection 302 (2) (a), the lower Courts failed to either consider or understand the language that heads Section 302 of the Retirement and Social Security Law of the State of New York, said introductory language being applicable to all the provisions under said Section, said language being as follows:

> "The following words and phrases as used in this article shall be the following meaning unless a different meaning is plainly required by the text."

It is obvious from the above language that the drafters of Section 302 realized that the interrelationship of the definitions set forth therein was such that situations would present themselves when strict application of the definitions, especially with regard to their interrelationship and application to facts and circumstances outside the context of said Section, would fly in the face of common sense and logical meaning and that when such a situation would present itself, it was the drafters intent not to have blind adherence to the wording of said definitions such that a meaning contrary to that which was intended was in fact achieved.

For the reasons stated above, Petitioner-Petitioner respectfully submits to the Court that the full sum received by Petitioner-Petitioner upon retirement as termination pay is includable in the term "final average salary" under Section 302, Subdivision 9 (b) of the Retirement and Social Security Law of the State of New York, and to deprive Petitioner-Petitioner thereof, is in violation of the due process guarantees of the Fifth and Fourteenth Amendments of the United States Constitution.

Lecci's Point II

As Petitioner-Petitioner's second point, the Court's attention is directed to what Petitioner-Petitioner contends to be a misunderstanding by the lower Courts as to the applicability of Section 333 and Section 341 (j) of the Retirement and Social Security Law of the State of New York, to the facts and circumstances of this case. In particular, Petitioner-Petitioner respectfully submits that the lower courts in their analysis, have misconstrued as well as misapplied the above referenced section of the Retirement and Social Security Law of the State of New York to the case at hand.

Before analyzing the relevance of Sections 333 and 341 (j) of the Retirement and Social Security Law of the State of New York to the issues presented herein, the Court's attention is again drawn to the wording of Sections 302, subsection 9 (b) and (d) and Section 431 of the Retirement and Social Security Law of the State of New York, as hereinbefore set forth.

As previously stated in analyzing the interrelationship of said Sections with regard to termination pay, the same arguments are applicable and relevant when defining the term "final average salary" as to the inclusion therein under Section 302, subsection (9) (b) of any lump sum payment paid upon retirement as compensation for unused sick leave credits.

As stated previously with regard to the inclusion of termination pay in the term "final average salary" under Section 302 (9) (b), the wording and adoption of Section 302, subsection (9) (d) emphasize the fact that by excluding in such legislation from the term "final average salary" as therein set forth, any sum paid upon retirement for unused sick leave credits, and not having amended Section 302, subsection (9) (b) at the same time so as to

exclude any such sum from the term "final average salary" as therein set forth, the term "final average salary", as a matter of legislative intent and statutory construction as applicable to Section 302, subsection (9) (b) of the Retirement and Social Security Law of the State of New York must, of necessity, include therein any sum paid upon retirement in the form of unused sick leave credits.

In furtherance of the above, the legislature passed Section 431, effective April 1, 1972, wherein the legislature again evidenced an intent to specifically exclude from the term "final average salary" any sums paid upon retirement for termination pay, unused sick leave, payment for deferred compensation, payment for accumulated vacation or other credits for time not worked said exclusion to be applicable to any retirement plan existing within the State. Since Section 302, Subsection (9) (d) already had excluded from the term "final average salary," as set forth therein, any sum representative of payment for unused sick leave, statutory interpretation as well as realization of the legislative intent behind the adoption of Section 431 dictate that the purpose of the legislature in passing Section 431 was to exclude from the term "final average salary" under Section 302, Subsection (9) (b) of the Retirement and Social Security Law of the State of New York any sum representative of payment made in the form of unused sick leave, and thus the legislature recognized the fact that prior to the adoption of Section 431, the term "final average salary" as set forth in Section 302, Subsection(9) (b) did include any sum paid upon retirement in the form of unused sick leave.

With the above as background, it should be further noted that Petitioner-Petitioner is a Nassau County employee and *not* a State employee. The significance of the above rests upon the fact that Section 341 (j) of the Retirement and Social Security Law of the State of New York is specifically applicable to State employees, and under said section, State employees choose to accept the benefit of sick leave with the condition that the cash equivalent for

such sick leave is not to be included in the "final average salary" for the purpose of determining the retirement allowance for said State employees. The text of Section 341 (j) of the Retirement and Social Security Law of the State of New York is herein set forth:

"§341

j. Allowance for unused sick leave for members in the employ of the state.

1. In addition to any other service credit to which he is entitled, a member who meets the requirements set forth in paragraphs two and three of this subdivision shall be granted one day of additional service credit for each day of accumulated unused sick leave which he has at time of retirement for service, but such credit shall not (a) exceed one hundred sixty-five days, (b) considered in meeting any service or age requirements prescribed in this chapter, and (c) be considered in computing final average salary.

2. Such service retirement credit shall be granted only to members in the employ of the state, other than members of the state police in a collective negotiating unit defined in the certification of the public employment relations board dated December twenty-ninth, nineteen hundred seventy in case numbers C-0570 and C-0575 established pursuant to article fourteen of the civil service law, who prior to retirement were subject to a plan established by law, rule, regulation, written order or written policy which provided for the regular earning and accumulation of sick leave.

3. The provisions of this subdivision shall apply to members retiring from service of the state on or after April first, nineteen hundred seventy and prior to April first, nineteen hundred seventy-three except, however, the provisions of this subdivision

shall apply to members of the state police in a collective negotiating unit consisting of commissioned officers established pursuant to article fourteen of the civil service law retiring from service of the state on or after April first, nineteen hundred seventy-one and prior to April first, nineteen hundred and seventy-three."

As is evident from the above, Section 341 (j) is applicable only to State employees. Under Section 333 of the Retirement and Social Security Law of the State of New York, which is set forth as follows:

"§333. Election of certain optional retirement benefits by participating employers.

By the adoption, filing and approval, where required, of a resolution in the manner provided by section three hundred thirty or section three hundred thirty-one of this article, a participating employer may elect to provide for its own employees any of the benefits provided for persons in the employ of the state listed in subdivision a or subdivision b, or both of them as follows:

a. subdivision j of section three hundred forty-one,

b. (1) subdivision k of section three hundred forty-one, (2) subdivision g of section three hundred forty-three, of this acticle and (3) subdivision four of section two hundred forty-three of the military law, as well as the benefits provided for employees of participating employers in section three hundred sixty-b and section three hundred seventy-five-i of this acticle.

The effective date of each such election may be made retroactive to April first, nineteen hundred seventy-provided such election is filed within forty-

five days following the date this act takes effect. Such election may be for a limited period if such limitation is included in the resolution, upon the expiration of which such election will be deemed revoked."

A participating employer may elect to provide for its own employees any of the benefits provided under Section 341 (j) with the same restrictions on said benefits as therein enumerated. In other words, the County of Nassau could, pursuant to Section 333, adopt a resolution such that its employees could receive payment at the time of retirement for unused sick leave but have said payment deleted from the computation of an employee's "final average salary" under Section 302, Subsection 9 (b) of the Retirement and Social Security Law of the State of New York, and thereby provide a payment for unused sick leave benefit but avoid the need to increase its retirement contributions as a result of the granting of such a benefit.

The County of Nassau has not adopted such a resolution pursuant to Section 333 and, as a result, has not intentionally placed, upon the payment at retirement for unused sick leave, the qualification that said payment shall not be utilized in a computation of a retiree's "final average salary" under Section 302, Subsection 9 (b) of the Retirement and Social Security Law of the State of New York. In reality, the County has, by its actions, agreed to pay not only the sick leave benefit, but also to bear the additional costs of retirement contributions associated with having said payments included in the term "final average salary" under Section 302, Subsection 9 (b).

The lower Courts have, by their reasoning, attempted to state that because the County of Nassau has not adopted a resolution under Section 333, that therefore the County of Nassau cannot grant, under a collective bargaining agreement, payment for unused sick leave which would be

included in the computation of the term "final average salary" under Section 302, subsection (9) (b) of the Retirement and Social Security Law of the State of New York. Such a statement is obviously contrary to law as well as contrary to the case law which holds that the payment for unused sick leave to a public employee upon his retirement is not a gift and does not offend the State Constitution and that the requirement of consideration under such circumstances is met in that payment offered for unused sick leave by the public employer, results in more competent and more efficient service from employees since said employment fringe benefit encourages the employee to stay in public service thereby acquiring an expertise as to this job and additionally deters the employee from absenteeism for trifling ailments. (See *Teachers Association, Central High School District No. 3* v. *Board of Education, Central High School District No. 3 Nassau County*, 312 N.Y.S. 2d 252 [1970]).

The lower Courts in their attempt to rationalize that Sections 333 and 341 (j) prohibit, for non-State employees, inclusion in the term "final average salary" under Section 302, subsection (9) (b), any sum paid upon retirement for unused sick leave, besides misconstruing said Sections, also overlook the fact that the legislature, in restricting the term "final average salary" from including payment for unused sick leave when it passed Sections 302, subsection (9) (d) and Section 431 of the Retirement and Social Security Law of the State of New York, did not amend or alter the language of Section 302, subsection (9) (b) and, therefore, specifically mandated that under said Section, there is to be included in the term "final average salary" any sums paid upon retirement for unused vacation credits. To conclude otherwise would usurp the power of the legislature to legislate as to the laws within the State of New York.

In summary, Petitioner-Petitioner contends that Section 341 (j) and Section 333 of the Retirement and Social Security Law of the State of New York do not form a basis for holding that the payment received by Petitioner-Petitioner upon retirement for unused sick leave is excluded from the term "final average salary" under Section 302, Subsection 9 (b) of the Retirement and Social Security Law of the State of New York. As additional emphasis for the above, Petitioner-Petitioner respectfully submits that if the lower Courts reasoning was upheld, there would be absolutely no reason for having included in Section 302, Subsection 9 (d) and Section 431 of the Retirement and Social Security Law of the State of New York, the exclusion from the term "final average salary" of a sum paid upon retirement for unused sick leave.

For the reasons stated above, Petitioner-Petitioner respectfully submits to the Court that the sum received by Petitioner-Petitioner upon retirement as compensation for unused sick leave is includable in the term "final average salary" under Section 302, Subsection 9 (b) of the Retirement and Social Security Law of the State of New York, and to deprive Petitioner-Petitioner thereof is in violation of the due process of the guarantees of the Fifth and Fourteenth Amendments of the United States Constitution.

Lecci's Point III

As Petitioner-Petitioner's third point, Petitioner-Petitioner respectfully submits to the Court that pursuant to the above cited provisions of Petitioner-Petitioner's collective bargaining agreement as well as pursuant to Section 302, subsection (9) (b) of the Retirement and Social Security Law of the State of New York, Petitioner-Petitioner is entitled to receive upon retirement, payments for termination pay and unused sick leave, the full sums of

which Petitioner-Petitioner contends are includable in the term "final average salary" pursuant to Section 302, Subsection 9 (b) of the Retirement and Social Security Law of the State of New York, and that as a result, said benefits, in their entirety, are vested retirement benefits, the impairment of which are prohibited by Article V Section 7 of the New York State Constitution.

In support of the above, Petitioner-Petitioner respectfully draws the Court's attention to the above referenced arguments as hereinbefore set forth.

As additional reinforcement of Petitioner-Petitioner's position, the Court's attention is respectfully drawn to the fact that the Legislature, in 1970, passed Section 431 of the Retirement and Social Security Law of the State of New York, said Section specifically excluding from the term "final average salary" any sums paid for unused sick leave or termination pay with regard to a retiree retiring under any State retirement system after April 1, 1972.

The text of Section 431 of the Retirement and Social Security Law of the State of New York has been herein set forth and reference thereto is herein made.

Since termination pay and pay for unused sick leave are already excluded from Section 302, Subsection 9 (d) of the Retirement and Social Security Law of the State of New York, Section 431 must be directed to the limiting of the term "final average salary" as defined in Section 302 Subsection 9 (d) by excluding therefrom any sums received upon retirement in the form of termination pay or payment for unused sick leave.

In view of the above, Petitioner-Petitioner respectfully submits that Petitioner-Petitioner's retirement benefits have been impaired by the actions of the Respondent-Respondent and that therefore his constitutionally guaran

teed rights under Article V, Section 7 of the New York State Constitution, have been violated as well as the due process guarantees afforded Petitioner-Petitioner's in the Fifth and Fourteenth Amendments of the United States Constitution.

Conclusion as to Lecci

For the reasons stated above, this court should grant Petitioner-Petitioner's Writ of Certiorari since Respondent-Respondent's actions have violated Petitioner-Petitioner's constitutional guarantees as set forth in the due process clauses of the 5th and 14th Amendments to the United States Constitution as well as having violative Petitioner-Petitioner's constitutional guarantees as set forth under Article V Section 7 of the New York State Constitution.

The Greenwald Case

This Writ of Certiorari is being sought from a decision of the Court of Appeals of the State of New York dated June 6, 1974, the text of which is set forth herein as Exhibit L.

Statement

Initially, the proceedings instituted herein by Plaintiff-Petitioner were brought in the form of a Complaint in an action for Declaratory Judgment seeking to have declared as unconstitutional and invalid, Section 431 of the Retirement and Social Security Law of the State of New York, the text of which is herein set forth as Exhibit "M".

Defendant-Respondent interposed an Answer dated March 7, 1972, the text of which is herein set forth as Exhibit "N".

In response to Defendant-Respondent's Answer, Plaintiff-Petitioner brought a motion for Summary Judgment seeking an Order striking out Defendant-Respondent's Answer and directing the entry of Summary Judgment in favor of the Plaintiff-Petitioner and against the Defendant-Respondent for the relief demanded in the Complaint, said motion being returnable April 14, 1972, the text of which is set forth herein as Exhibit "O".

In response to Plaintiff-Petitioner's motion for Summary Judgment, Defendant-Respondent interposed an Affidavit in Opposition thereto, said Affidavit dated May 4, 1972, the text of which is set forth herein as Exhibit "P".

In reply to said Affidavit in Opposition, Plaintiff-Petitioner interposed a Reply Affidavit dated May 11, 1972, the text of which is set forth herein as Exhibit "Q".

On July 25, 1971, the Hon. John T. Casey rendered a memorandum decision based upon the issues raised in the above referenced pleadings, said decision being directed to the motion for Summary Judgment, wherein said motion was denied, except as to the inclusion of the cash value of accrued but unused vacation credits in the computation of the term "final average salary" to the extent indicated in *Kranker* v. *Levitt*, 30 N.Y. 2d 574.

An Order dated August 11, 1972, based upon the July 25, 1972, memorandum decision of the Honorable Justice John T. Casey was entered August 16, 1972, in the Office of the Clerk of the County of Albany, State of New York, the text of said memorandum decision and order being set forth herein as Exhibit "R". On August 23, 1972, Plaintiff-Petitioner appealed to the Appellate Division of the New

York Supreme Court, Third Judicial Department, the decision by the Honorable Justice John T. Casey, a copy of said Notice of Appeal being set forth herein as Exhibit "S".

In an opinion by the Honorable J. Greenblott, dated May 31, 1973, the Appellate Division of the Supreme Court in and for the Third Department, modified the lower Court's determination, the text of said opinion being set forth herein as Exhibit "I". An Order dated June 7, 1973, was entered in the Clerk's Office of the County of Albany of the State of New York reflecting the Appellate Division's determination, the text of which is set forth herein as Exhibit "T".

On July 2, 1973, Plaintiff-Petitioner appealed the Appellate Division's determination by filing a Notice of Appeal with the Clerk of the Court of Appeals, the text of said Notice of Appeal being set forth herein as Exhibit "U".

On June 6, 1974, the Court of Appeals for the State of New York affirmed the decision of the Appellate Division of the Supreme Court of the State of New York on the opinion of Mr. Justice Louis M. Greenblott, a copy of said memorandum decision is set forth herein as Exhibit "L".

Facts

The factual background upon which the Plaintiff-Petitioner instituted the original proceedings and upon which the Writ of Certiorari is based is not in dispute. Plaintiff-Petitioner was appointed to the Police Department of the County of Nassau on the 3rd day of June, 1957, and has continued in such a capacity to date. Plaintiff-Petitioner by virtue of the fact that he is a policeman employed by the Nassau County Police Department, a participating member in the New York State Policemen's and Firemen's Retirement System, was a member of the New York State Policemen's and Firemen's System and entitled to all the benefits thereunder.

A contract was entered into after several months of collective bargaining on the 8th day of March, 1971, between the Nassau County Patrolmen's Benevolent Association and the County of Nassau. The Nassau County Patrolmen's Benevolent Association was the recognized bargaining agent for all members of the Nassau County Police Department from the rank of patrolman to that of detective-captain. The contract entered into on the 8th day of March 1971, was negotiated pursuant to the Taylor Law and was made retroactive so as to have a binding effect upon all members of the bargaining unit who were employed by the Nassau County Police Department on or after January 1, 1971. The term of said contract was from January 1, 1971, to December 31, 1972.

Plaintiff-Petitioner was and still is a patrolman in good standing in the Nassau County Police Department and is entitled to all of the benefits of said contract. Pursuant to paragraph 7 (m) of the 1971-72 contract, which reads as follows:

"7. *Employee Benefits*

m. Termination Pay. Upon separation from service, after twenty (20) years, for any reason, other than cause, or upon the death in service of any employee or upon retirement qualifying for either ordinary or accidental disability under the Retirement and Social Security Law of New York State such employee or his legal representative, shall be entitled to cash payment for accumulated terminal leave computed on an entitlement basis of three (3) days for each year of completed service. On or after January 1, 1972 such entitlements shall be computed on the basis of four (4) days for each year of completed service. Year of completed service shall only include time served as a member of the Police Force of the County on a full pay status, while on a Military leave of absence pursuant to Section 243 of the

Military Law of New York State and time actually credited toward retirement benefits for service during World War II as provided in Ordinance No. 298-1970. In addition, an employee or his legal representative entitled to cash payment for accumulated terminal leave, shall be paid in a lump sum the value of his accumulated and unused sick leave to the extent of fifty (50) percent thereof, but not to exceed a total of one hundred sixty-five (165) working days."

Plaintiff-Petitioner upon retirement, is entitled to termination pay equivalent to three (3) days pay per year multiplied by the number of years served with the Nassau County Police Department prior to his retirement. On or after January 1, 1972, such entitlements are to be computed on the basis of four (4) days pay per year multiplied by the number of years served. In addition, as set forth in paragraph 7 (m) of said 1971-72 contract, Plaintiff-Petitioner is entitled, upon retirement, to a maximum of 165 days for unused sick leave.

Additionally, under paragraph 7 (l) of the 1971-72 contract, Plaintiff-Petitioner is entitled, upon retirement, to a lump sum payment for accumulated but unused vacation credits. The above is evident, upon review of the following text of paragraph 7 (l), of said 1971-72 contract, as modified by paragraph 8 of the Rules and Regulations of the Nassau County Police Department, the texts of which are also set forth below.

1971-72 Contract

7. Employee Benefits

1. Vacation, Sick Leave and Leaves of Absences. (1) Except as provided herein, vacations, sick leave and leaves of absences shall be as presently provided in the Rules and Regulations of the Police Department.

(2) . . .

(3) . . .

(4) Employees shall receive vacation time on a working day basis. Employees with less than five (5) years of continuous service shall receive twenty (20) working days during each calendar year. Employees with five (5) or more years of continuous service shall receive twenty-seven (27) working days during each calendar year. An employee shall work one continuous year of service before receiving his vacation time. Thereafter, vacation time shall be credited on January 1st of each year. In addition, his additional credits for five (5) or more years of continuous service shall be only credited on his anniversary date of such fifth year.

(5) . . .

(6) Vacation time shall not be lost because of an employee's illness, providing the illness does not continue for more than one continuous year. Such vacation time may be carried over and taken during the following calendar year. However, a member on vacation may not sign on sick leave until the termination of his vacation period."

Rules and Regulations of the Nassau County Police Department

"Rule (8) Vacation

. . .

8. A member of the Force whose services are terminated for any reason other than cause, shall be entitled to cash payment of the monetary value of his accumulated and unused vacation."

Pursuant to Chapter 503 for the laws of 1971 of the State of New York, Section 431 of the Retirement and Social Security Law of the State of New York was enacted, effective April 1, 1972. Section 431 reads as follows:

"*Salary base for computing retirement benefits*
In any retirement or pension plan to which the state or municipality thereof contributes, the salary base for the computation of retirement benefits shall in no event include any of the following earned or received, on or after April first, nineteen hundred seventy-two:

1. lump sum payments for deferred compensation, sick leave, accumulated vacation or other credits for time not worked,

2. any form of termination pay

3. any additional compensation paid in anticipation of retirement, or

4. that portion of compensation earned during any twelve months included in such salary base period which exceeds that of the preceding twelve months by more than twenty per centum."

Plaintiff-Petitioner contends that the provisions of Section 131 of the Retirement and Social Security Law are unconstitutional as they apply to persons like Plaintiff-Petitioner who were members of the Nassau County Police Department and of the Policemen's and Firemen's Retirement System prior to April 1, 1972, in that said Section impairs vested pension benefits to which Plaintiff-Petitioner and others similarly situated are entitled, said impairment being in direct contradiction to the Article V, Section 7 of the New York State Constitution which prohibits the diminishing and/or impairment of pension benefits as well as having said actions by Defendant-Respondent infringe Plaintiff-Petitioner's due process guarantees as set forth in the 5th and 14th Amendments to the United States Constitution.

Bases For Granting The Writ As To Greenwald

The basis for granting said Writ for and on behalf of Plaintiff-Petitioner, Greenwald, is to allege error in the lower Courts holdings that Plaintiff-Petitioner was not entitled to an order striking out the Defendant-Respondent's answer and directing the entry of summary judgment in favor of Plaintiff-Petitioner against Defendant-Respondent that declared as unconstitutional and invalid all of Section 431 of the Retirement and Social Security Law of the State of New York as applicable to Plaintiff-Petitioner.

More particularly, Plaintiff-Petitioner alleges that the lower Courts erred in their failure to recognize that pursuant to Plaintiff-Petitioner's collective bargaining agreement with its employer, the County of Nassau, a participating member in the New York State Policeman's and Fireman's Retirement System, that upon meeting the requirements for retirement, Plaintiff-Petitioner would become entitled to receive cash payments for accumulated unused sick leave, accumulated unused vacation time, and termination pay, and that said sums are thus includable in the term "final average salary" pursuant to Subsection 302 (9) (b) of the Retirement and Social Security Law of the State of New York, and as such, are vested retirement benefits, the impairment of which violates Article V, Section 7 of the New York State Constitution and that to deny to Plaintiff-Petitioner the appropriate inclusion thereof, violates his constitutionally guaranteed rights of "due process" under the 5th and 14th Amendments to the United States Constitution as to property rights.

Greenwald Point I

As Plaintiff-Petitioner's first point, Plaintiff-Petitioner wishes to point out to the Court that with regard to the question of whether or not unused vacation credits are a vested retirement benefit included in the term "final average salary" under Subsection 302 (9) (b) of the Retirement and Social Security Law of the State of New York, reference is made to a recent decision from the Supreme Court, County of Albany, entitled *Kranker* v. *Levitt*, 30 N.Y. 2d 574 (1971), which held that unused accumulated vacation credits were a vested retirement benefit that could not be impaired and that the lump sum payment upon retirement of their cash equivalency was properly includable in the term "final average salary" under Subsection 302 (9) (b) of the Retirement and Social Security Law of the State of New York.

The lower Courts recognized, as legal precedent, the holding in *Kranker* v. *Levitt, supra*, which accordingly held Section 431 of the Retirement and Social Security Law of the State of New York as added by Chapter 503 of the laws of 1971 to be null, void, ineffective, and of no force whatsoever in respect to that portion of Section 431, which eliminated accumulated vacation credits from inclusion in the term, "final average salary", under Subsection 302 (9) (b).

In following *Kranker* v. *Levitt, supra*, Special Term granted Plaintiff-Petitioner's motion for Summary Judgment as to that portion that directed itself to vacation pay, said determination being upheld by the Appellate Division, Third Department, the language of the Hon. Justice John T. Casey of Special Term, stating, " . . . plaintiff is granted summary judgment as to the inclusion of vacation pay as to the extent indicated in *Kranker* v. *Levitt, supra*."

Although, Plaintiff-Petitioner concurs with the lower Courts and the holding in *Kranker* v. *Levitt, supra*, with regard to the fact that vacation pay is includable in the term "final average salary" under Section 302 Subsection 9 (b) of the Retirement and Social Security Law of the State of New York, and is thus a vested retirement benefit, the impairment of which would violate Article V Section 7 of the New York State Constitution, Plaintiff-Petitioner contends that such recognition of benefits should not be limited to a thirty (30) day period.

Under the facts of *Kranker* v. *Levitt, supra*, Kranker, pursuant to the terms of his employment as a State employee, was entitled to compensation for vacation credits only to a maximum of thirty (30) days. Plaintiff-Petitioner takes the position that he should not be so limited to a thirty (30) day period, but rather, should be entitled to the maximum number of days of unused vacation that he is entitled to receive compensation for upon retirement pursuant to the terms and conditions of his employment, similar to Kranker, as there is nothing magical in the thirty (30) day term that was characteristic of Kranker's employment. It should be pointed out to the Court that Plaintiff-Petitioner could, under proper circumstances accumulate up to sixty (60) days of unused vacation for which he could, upon retirement, receive its cash equivalent.

Greenwald's Point II

Plaintiff-Petitioner, as its second point, respectfully submits to this court that the lower court erred in its holding with regard to its conclusion that, although termination pay, as applicable to Plaintiff-Petitioner was a vested retirement benefit includable in the term "final average salary" under Section 302, Subsection (9) (b) of the Retirement and Social Security Law of the State of New York, the impairment of which is prohibited by Article V,

Section 7 of the New York State Constitution, that said benefit was only applicable to termination pay calculated on an entitlement basis of three (3) days pay per year for three (3) years rather than, as contended by Plaintiff-Petitioner, three (3) days pay per year times the total number of years of actual service.

As stated above, Plaintiff-Petitioner takes the position that the entire sum received upon retirement by Plaintiff-Petitioner as termination pay is includable in the term, final average" pursuant to Subsection 302 (9) (b). Additionally, Plaintiff-Petitioner submits to this Court that it has been judicially determined that termination pay in properly the subject matter of a collective bargaining agreement between a municipality and its employees and that such payment is not a constitutionally prohibited gift of public funds. (See *Lecci* v. *Nickerson*, 63 Misc. 2d 756 (1970) 313 NYS 2d 474)

Further, Plaintiff-Petitioner submits to this Court that the term "final average salary" as set forth in Section 302 Subsection 9 (b) of the Retirement and Social Security Law of the State of New York, means the "highest average annual compensation earned during any three (3) consecutive years" and that Plaintiff-Petitioner's right to termination pay is only earned and becomes due and payable when Plaintiff-Petitioner retires in good standing. If Plaintiff-Petitioner resigns or is dismissed prior to his retirement, he is not entitled to said termination pay. Thus, entitlement to said benefit, is contingent upon Plaintiff-Petitioner retiring in good standing and therefore, said benefit is *earned* at the time and by the act of retiring and thus is includable in the term "final average salary" as defined in Subsection 303 (9) (b) (See *Moore, etc.* v. *Board of Education, etc.* 84 NYS 2d 417 (1948) affirmed. 299 MU 666; *Lecci* v. *Nickerson, supra*).

In addition to the above, a combined reading of Section 302, Subsections 9 (b) and (d) of the Retirement and Social Security Law of the State of New York reinforces the conclusion that the term "final average salary" as set forth under Section 302 Subsection 9 (b) includes within its definition, any lump sum payment for termination pay. According to the rules of statutory construction, (McKinneys Statutes, Sections 212 and 240), since lump payments for sick leave, or accumulated vacation credit, or any form of termination pay are specifically excluded from the term, "final average salary" in Section 302, Subsection (9) (d), then statutory construction of said overall section dictates that the term "final average salary" under Section 302, Subsection (9) (b) encompasses the full amount of any lump sum payment for termination pay. If the legislature had felt otherwise, it would have recited that said payments were excluded from the term "final average salary" under Section 302, Subsection (9) (b), when in 1970 the legislature amended Section 302 by adding with its exclusionary language Section 302, Subsection (9) (d).

As reinforcement of the above conclusion, the Legislature passed Section 431 of the Retirement and Social Security Law of the State of New York, which is the subject matter of this action, and which attempts to exclude from inclusion in the term "final average salary" any sums paid for termination pay. Since said amounts are already excluded from Section 302, Subsection (9) (d), Section 431 is obviously directed to altering Section 302, Subsection (9) (b) by attempting to exclude from inclusion therein the term "final average salary", such a sum as termination pay. Thus, Plaintiff-Petitioner reiterates, that termination pay in its entirety is included within the term "final average salary" under Subsection 302 (9) (b) and that said benefit has therefore become a vested retirement benefit to members of the Nassau County Police Department who were employed prior to the effective date of Section 431, to wit, April 1, 1972, and any attempt at diminishing or impairing said vested retirement benefit is strictly prohibited by Article V, Section 7 of the New York State Constitution.

That Plaintiff-Petitioner is entitled to the inclusion within the term "final average salary" under Section 302 Subsection (9) (b) of the total sum received as termination pay at the time of retirement is further evidenced by the fact that Defendant-Respondent recognized said benefit with regards to those members of the Nassau County Police Department who retired in 1970 and did in fact include within the computation of their respective "final average salary" under Section 302, Subsection (9) (b) the full amount of termination pay received respectively by said retirees upon their retirement. Defendant-Respondent was placed in an impossible situation as a result of the above with regards to those members of the Nassau County Police Force who retired in 1971 under a contract whose provisions with regards to termination pay were for all practical purposes identical with the 1970 contract provisions related thereto, since Defendant-Respondent initially took the position that the term "final average salary" under Subsection 302 (9) (b) for those who retired in 1971 excluded therefrom the total amount paid to said retirees for termination pay while continuing to pay to said 1970 retirees, benefits inclusive of said full amount received as termination pay.

When this inconsistency was realized by Defendant-Respondent, Defendant-Respondent arbitrarily and without justification stated that "an error" was made with regards to the computation of the 1970 retirees benefits based upon the 1970 Nassau County PBA Contract, totally ignoring the fact that termination pay was properly includable in the term "final average salary" under Subsection 302 (9) (b) and that to so exclude same from said computation controverted the expressed constitutional prohibition against the impairment and are diminishing of pension benefits. As a result of Defendant-Respondent's unilateral action, the co-pending action of *Weber* v. *Levitt* which is part of the Writ herein sought was instituted resulting in the determination that conceptually, termination

pay is a vested retirement benefit includable in the term "final average salary" under Section 302, Subsection (9) (b) of the Retirement and Social Security Law of the State of New York.

Greenwald's Point III

As Plaintiff-Petitioner's third point, Plaintiff-Petitioner respectfully submits to the Court that pursuant to the above cited provisions of Plaintiff-Petitioner's collective bargaining agreement, Plaintiff-Petitioner is entitled to receive upon retirement, payment for unused sick leave, the full sum of which is includable in the term "final average salary" pursuant to Subsection 302 (9) (b) of the Retirement and Social Security Law of the State of New York, and that as a result, said benefit, in its entirety, is a vested retirement benefit, the impairment of which is prohibited by Article V, Section 7 of the New York State Constitution.

With regard thereto, Plaintiff-Petitioner respectfully submits to the Court that it has been judicially determined that payment of the cash value of unused sick leave upon retirement is not a constitutionally prohibited gift of public funds. See *Teachers Association, Central High School, District No. 3* v. *Board of Education, Central high School, District No. 3, Nassau County*, supra, *Board of Education Etc.* v. *Associated Teachers Etc.*, 62 Misc. 2d 906 (1970), 310 NYS 2d 929.

As discussed above with regard to termination pay, it should be noted that the full amount received upon retirement for unused sick leave is an amount includable in the term "final average salary" as defined under Subsection 302 (9) (b) of the Retirement and Social Security Law of the State of New York since, as defined therein, the term "final average salary" means the "highest average annual

compensation *earned* during any three consecutive years . . ." (emphasis added.) With the above definition in mind, it should be noted that Plaintiff-Petitioner's right to pay for unused sick leave is only *earned* and becomes due and payable when and if Plaintiff-Petitioner retires in good standing.

In addition to having the amount received upon retirement for unused sick leave meet the definition of the term "final average salary" as set forth under Subsection 302 (9) (b), statutory interpretation of Section 302, Subsection 9 of the Retirement and Social Security Law of the State of New York also results in the conclusion that the term "final average salary" as set forth under Section 302, Subsection 9 (b), includes within its definition any lump sum payment for unused sick leave. The above results from the fact that since lump sum payments for sick leave are specifically excluded from the term "final average salary" in Section 302, Subsection (9) (b), statutory construction of the overall section dictates that the term "final average salary" under Subsection 302 (9) (b) encompasses the full amount of any lump sum payment for unused sick leave. If the legislature had felt otherwise, it would have recited that payment for unused sick leave was excluded from the term "final average salary" under Subsection (9) (b) as it had done with respect to Section 302, Subsection (9) (d) when, in 1970, Subsection (9) (d) was added to Section 302, Subsections (9) (a), (9) (b) and (9) (c) of the Retirement and Social Security Law of the State of New York.

As additional reinforcement of the above conclusion, the legislature passed Section 431 of the Retirement and Social Security Law of the State of New York which is the subject matter of this action and which attempts to exclude from inclusion in the term, "final average salary," any sums paid for unused sick leave. Since said amounts are already excluded from Section 302, Subsection (9) (d), Section 431 must be directed to altering Section 302, Subsection (9) (b)

by excluding from inclusion in the term "final average salary" under said Subsection (9) (b), such a sum as paid for unused sick leave. Thus, Plaintiff-Petitioner reiterates that said pay for unused sick leave is includable under Subsection 302 (9) (b) within the term "final average salary" and has therefore become a vested retirement benefit to members of the Nassau County Police Department who were employed prior to the effective date of Section 431, to wit, April 1, 1972, and any attempt at diminishing or impairing said vested retirement benefit is statutorily prohibited by Article V, Section 7 by the New York State Constitution as well as being violative of the due process guarantees under the 5th and 14th Amendments to the United States Constitution as applicable to property rights.

Greenwald's Point IV

As Plaintiff-Petitioner's fourth point, Plaintiff-Petitioner respectfully submits to the Court that Article VII, Section 8 of the New York State Constitution gave the legislature power to increase pension benefits. Under the Taylor Law this power can be delegated to the "public employer" through its chief executive officer. (See *Lecci Etc.* v. *Nickerson Etc., supra.* Thus, the public employer, in this case, the County of Nassau under the Taylor Law can enter into binding collective negotiations as to the terms and conditions of employment in the form of employee rights and benefits not otherwise authorized or prohibited by law and thereby can bind the State Comptroller with respect to pension benefits even though he was not physically a party to the negotiations. (See Civil Service Law of the State of New York, Section 204 (1); and *Lecci Etc.* v. *Nickerson Etc., supra.*) In so doing, the public employer does not vary the provisions of the Retirement and Social Security Law, but rather enters into contractual obligations pursuant to the Taylor Law with respect to terms and conditions of employment. (See *Board of Education Etc.* v. *Associated Teachers Etc., supra.*)

It is obvious to all concerned that contract negotiations related to the terms and conditions of employment, between a public employer such as the County of Nassau and an employee thereof, such as Plaintiff-Petitioner, to wit, the basic salary of said employee, is proper and binding upon the Retirement System as well as the County of Nassau. It has never been contested by the Retirement System that an increase in the salary base of a municipal employee is not binding upon them as to the proportionate increase in the accompanying retirement benefit associated therewith. Obviously, the Retirement System was not a party to said contract negotiations, but yet, permits itself to be bound by said term and condition of employment.

Plaintiff-Petitioner, respectfully contends that the foregoing benefits, to wit, lump sum payments for termination pay, unused vacation pay and payment for unused sick leave credits, are proper items which fall within the definition of "terms and conditions of employment" which have been heretofore accepted as proper subjects for negotiation between a municipal employer and its employees. The courts have heretofore acknowledged the validity of said benefits. (See *Kranker* v. *Levitt, supra*; *Lecci* v. *Nickerson, supra; Teachers Association Etc.* v. *Board of Education Etc., supra;* and *Board of Education Etc.* v. *Associated Teachers Etc., supra.*)

In addition, said benefits were incorporated as part of the terms and conditions of an employment contract entered into between the County of Nassau and the Nassau County Policemen's Benevolent Association covering the contract period of 1971-72 and as a result thereof said benefits are in fact contractual retirement provisions that were vested in Plaintiff-Petitioner, the impairment of which is prohibited by Article V, Section 7 of the New York State Constitution.

Greenwald's Point V

As Plaintiff-Petitioner's fifth point, Plaintiff-Petitioner states to the Court that Sections 333 and 341 (j) of the Retirement and Social Security Law of the State of New York are not applicable to Plaintiff-Petitioner since Plaintiff-Petitioner is not a State employee and therefore the prohibition against including in the term "final average salary" any sum received for payment of unused sick leave is not applicable to Plaintiff-Petitioner.

The arguments set forth in "LECCI'S POINT II" will not be repeated at this point, but rather, the Court is respectfully requested to refer to said arguments and consider same as if fully set forth under Plaintiff-Petitioner's Point V as they state Plaintiff-Petitioner's position with regard to said issues as applicable to *GREENWALD.*

Greenwald's Point VI

As Plaintiff-Petitioner's sixth point, Plaintiff-Petitioner wishes to direct the court's attention to the wording of Section 431, paragraph 4 of the Retirement and Social Security Law of the State of New York which excludes from the salary base for the computation of retirement benefits:

> "that portion of compensation earned during any twelve months included in such salary base period which exceeds that of the preceding twelve months by more than twenty per centum."

With regards to the above cited paragraph of Section 431, Plaintiff-Petitioner states that as presently constituted, such a limitation is an impairment of Plaintiff-Petitioner's constitutional right to contract as defined in the Taylor Law. In particular, if the language of Section 431, paragraph 4 was upheld, Plaintiff-Petitioner would be

prohibited from ever being able to negotiate an employment contract that reflected an increase in the salary base of over 20%. Obviously, *to permit such interference into* the collective bargaining arena heretofore acknowledged and protected by the Taylor Law, directly contradicts previously recognized rights and guarantees with regards to Plaintiff-Petitioner ability to freely contract with regards to the terms and conditions of his employment.

Plaintiff-Petitioner does not take the position that properly defined limitations cannot be placed upon the negotiation process between a governmental employer and his respective employees; however, the currently worded language of Section 431, paragraph 4, as set forth above, does not fall within such recognized limitations.

Conclusion as to Greenwald

For the reasons stated above, this court should grant Plaintiff-Petitioner's Writ of Certiorari since Defendant-Respondent's actions have violated Plaintiff-Petitioner's constitutional guarantees as set forth in the due process clauses of the 5th and 14th Amendments to the United States Constitution as well as having violated Plaintiff-Petitioner's constitutional guarantees as set forth under Article V Section 7 of the New York State Constitution.

The Weber Case

This Writ of Certiorari is being sought from a decision of the Court of Appeals of the State of New York dated June 6, 1974, the text of which is set forth herein as Exhibit L.

Statement

Initially, the proceedings instituted herein by Petitioner-Petitioner were pursuant to Article 78 and were initiated by an Order to Show Cause with an accompanying Petition, said Order to Show Cause having been signed by the Hon. Edward S. Conway, Justice of the Supreme Court of the State of New York, County of Albany, and dated April 10, 1972, the text of said Order to Show Cause and accompanying Petitioner being set forth herein as Exhibit "V".

Respondent-Respondent interposed an Answer dated May 3, 1972, and in response thereto Petitioner-Petitioner interposed a reply dated May 11, 1972, the text of both being set forth herein as Exhibits "W" and "X" respectively.

On July 25, 1972, the Hon. John T. Casey rendered a memorandum decision based upon the issues raised by the above referenced pleadings wherein the relief demanded by the Petitioner-Petitioner, namely to have Respondent-Respondent refrain from recomputing Petitioner-Petitioner's "final average salary" with regard to determining his retirement allowance, was denied to the extent that Respondent-Respondent was permitted to recompute said final average salary based upon having said recomputed sum contain an amount for termination pay computed by a formulation that gave credit for three days pay for a period of three years rather than the originally computed formulation that gave credit for three days pay for the entire period of service of Petitioner-Petitioner namely, twenty years.

An Order dated August 11, 1972, based upon the July 25, 1972, Memorandum Decision of the Hon. Justice John T. Casey was entered August 16, 1972, the text of said memorandum decision and order being set forth herein as Exhibit "Y".

On August 23, 1972, Petitioner-Appellant appealed to the Appellate Division of the New York Supreme Court, Third Judicial Department, the decision by the Honorable Justice John T. Casey, a copy of said Notice of Appeal being set forth herein as Exhibit "Z".

In an opinion by the Honorable J. Greenblott, dated May 31, 1973, the Appellate Division of the Supreme Court in and for the Third Department, affirmed the lower court's determination, the text of said opinion being set forth herein as Exhibit "I". An Order dated June 7, 1973, was entered in the Clerk's Office of the County of Albany of the State of New York reflecting the Appellate Division's determination, the text of which is set forth herein as Exhibit "AA".

On July 3, 1973, Petitioner-Petitioner sought to appeal the Appellate Division's determination by bringing a motion before the Court of Appeals for leave to appeal thereto said Appellate Division's determination. On October 11, 1973, the Court of Appeals of the State of New York granted Petitioner-Appellant's motion for leave to appeal, the text of said Order being set forth herein as Exhibit "BB".

On June 6, 1974, the Court of Appeals for the State of New York affirmed the decision of the Appellate Division of the Supreme Court of the State of New York on the opinion of Mr. Justice Louis M. Greenblott, a copy of said memorandum decision is set forth herein as Exhibit "L".

Facts

The factual background upon which the Petitioner-Petitioner instituted the original proceedings and upon which the Writ of Certiorari is based is not in dispute. Petitioner-Petitioner was appointed to the Nassau County

Police Department on the 15th day of February, 1950, and retired therefrom on the 23rd day of February, 1970. Petitioner-Petitioner, by virtue of the fact that he was a policeman employed by the Nassau County Police Department, a participating member in the New York State Policemen's and Firemen's Retirement System, was a member of the New York State Policemen's and Firemen's Retirement System and entitled to all the benefits thereunder.

A contract was entered into after several months of collective bargaining on the 16th day of March, 1970, by the Nassau County Patrolmen's Benevolent Association and the County of Nassau, the text of which is set forth as Exhibit "A" of Petitioner-Petitioner's original petition which is set forth herein as Exhibit "V".

The Nassau County Patrolmen's Benevolent Association was the recognized bargaining agent for all members of the Nassau County Police Department from the rank of Patrolman to Detective Captain. The contract entered into on the 16th day of March, 1970, was negotiated pursuant to the Taylor Law and was made retroactive so as to have a binding effect upon all members of the bargaining unit who were employed by the Nassau County Police Department on or after January 1, 1970.

Petitioner-Petitioner was a patrolman in good standing in the Nassau County Police Department until the date of his retirement on February 23, 1970, and entitled to all the benefits of said contract. Pursuant to sub-paragraph 7 (k) of the 1970 agreement, Petitioner-Petitioner was entitled, upon retirement, to termination pay equivalent to three (3) days pay per year for all years served with the Nassau County Police Department prior to his retirement. The text of sub-paragraph 7 (k) reads as follows:

"k. Termination Pay.

> Upon Separation from service, after twenty (20) years, for any reason, other than cause, or upon the death in service of any employee, such employee or his legal representative, shall be entitled to cash payment for accumulated terminal leave computed on an entitlement basis of three (3) days for each year of completed service . . ."

Petitioner-Petitioner served twenty (20) years with the Nassau County Police Department and was paid by the County of Nassau; upon his retirement, a lump sum cash termination payment calculated by multiplying the number of years by a three day pay per year figure, said pay figure representing the daily pay rate to which Petitioner-Petitioner was entitled on the date of his retirement.

Upon retirement, Petitioner-Petitioner was notified, and his retirement allowance reflected in the checks that he received, that his "final average salary," upon which his retirement benefits were calculated under Section 302, Subsection 9 (b) of the New York State Retirement and Social Security Law, was computed to include the full amount of termination pay paid to him by the County of Nassau upon his retirement.

That as of March 30, 1972, more than two (2) years after retirement, and after receiving close to two dozen monthly retirement checks that reflected a retirement allowance based upon a "final average salary" that included therein the full sum received for termination pay by Petitioner-Petitioner upon retirement, Petitioner-Petitioner was advised by letter from the Respondent-Respondent that Petitioner-Petitioner retirement allowance was being recalculated due to an alleged "error" in computing the Petitioner-Petitioner's "final average salary." That from April 1, 1972 to date, Petitioner-Petitioner retirement allowance reflects a reduction of approximately Thirty-five ($35.00) dollars per month, said reduced retirement allow-

ance being based upon a "final average salary" calculation that includes a sum for termination pay representative of three days pay per year multiplied by only a three year term as opposed to the original calculation which incorporated a twenty year term.

It is this recalculation by Respondent-Respondent of Petitioner-Petitioner's retirement benefits that forms the basis of the lower Court proceedings and the basis for the Writ herein sought.

Basis for Granting the Writ as to Lecci

The basis for granting said Writ for and on behalf of Petitioner-Petitioner, Weber are two fold.

In the first instance, Petitioner-Petitioner respectfully submits to this Court that error was committed by the lower Courts in holding that, includable in the term "final average salary" as applicable to Petitioner-Petitioner in computing his retirement allowance under Section 302, Subsection 9 (b) of the Retirement and Social Security Law of the State of New York, is a sum representative of termination pay that is calculated by multiplying the three (3) days pay per year figure by only a three (3) year term as opposed to multiplying said three (3) days pay per year figure by the total number of years actually worked by Petitioner-Appellant, which, in Petitioner-Appellant's case is a twenty (20) year period and thus Petitioner-Petitioner constitutional guarantees as set forth in the 5th and 14th Amendments to the United States Constitution as applicable to property rights, have been violated.

Secondly, Petitioner-Petitioner respectfully submits to this Court that error was committed in the lower Courts, in that by their decisions Petitioner-Petitioner's constitutionally guaranteed rights against impairment of retirement benefits as set forth in Article V, Section 7, of the New York State Constitution have been violated.

Weber's Point I

It is Petitioner-Petitioner's first contention that Section 302, Subsection (9) (b) of the Retirement and Social Security Law of the State of New York entitles a retiree, such as Petitioner-Petitioner, to have included in the term "final average salary" the full sum paid to him in the form of termination pay upon his retirement.

Although Petitioner-Petitioner's entitlement to have the total sum for termination pay received upon retirement included in the term "final average salary" under Section 302, Subsection (9) (b) of the Retirement and Social Security Law of the State of New York is based upon the same rationale and precedence set forth with regard to the *"Lecci"* case, Petitioner-Petitioner herein will repeat said arguments as assistance to the court in understanding Petitioner-Petitioner's position rather than merely refer to the previous Lecci statements.

Initially, the court's attention is respectfully drawn to the language of Section 302, Subsection 9 of the Retirement and Social Security Law of the State of New York as previously set forth herein.

Upon a comparative reading of subsection 302 (9) (b) and 302 (9) (d), both of which set forth a definition for the term "final average salary" as it is to be applied towards an individual retiree retiring under the New York State Policemen's and Firemen's Retirement System, depending upon which of the two definitions a retiree elects to retire under, it becomes obvious that under subsection 302 (9) (d), any sum paid for termination pay is to be excluded from the term "final average salary" whereas under subsection 302 (9) (b), no such exclusionary wording exists and thus under any conceivable rule of statutory interpretation, one must conclude that termination pay is in fact included under subsection 302 (9) (b's) definition of "final average salary".

As reinforcement of the above conclusion, it should also be noted by the Court that in 1970, the Legislature saw fit to amend subsection 302 (9) of the Retirement and Social Security Law of the State of New York. Prior to said amendment, Section 302 consisted of Subsections (9) (a), (9) (b), and (9) (c), as hereinbefore set forth. In 1970, the Legislature saw fit to add Subsection (9) (d) as hereinbefore set forth. In so doing, the Legislature did not amend any of the pre-existing language set forth in Section 302, Subsections (9) (a), (9) (b), and (9) (c), but rather left said language intact and merely added the language of Subsection (9) (d).

As stated above, the language of subsection 302 (9) (d) specifically excludes from the term "final average salary" any sum paid in the form of termination pay, but the Legislature in providing the specific exclusion under subsection 302 (9) (d), saw fit not to specifically enunciate said exclusion under the definition of the term "final average salary" as set forth in subsection 302 (9) (b). Thus, as previously stated, statutory interpretation, as well as Legislative intent dictate that under subsection 302 (9) (b) of the Retirement and Social Security Law of the State of New York, there is included in the term "final average salary" a sum representative of payment made in the form of termination pay. With regard thereto, it should additionally be pointed out to the Court that the Petitioner-Petitioner, Respondent-Respondent, and the lower Court are all in agreement as to said conclusion, the only item of dispute being whether only a portion of said termination pay is included in said term "final average salary" under subsection 302 (9) (b) of the Retirement and Social Security Law of the State of New York, or in the alternative, that said term, "final average salary", under subsection 302 (9) (b) includes the entire amount paid upon retirement as termination pay.

With the above in mind, the Court's attention is now drawn to the language of sub-paragraph 7 (k) of the collective bargaining agreement that defined for 1970 the employment relationship between the Petitioner-Petitioner and his employer, a participating member in the New York State Policemen's and Firemen's Retirement System, at the time that Petitioner-Petitioner retired and subsection (9) (b) of the Retirement and Social Security Law of the State of New York with the view towards interpreting the language of each provision in light of the other as well as in the context of the facts and circumstances of the case currently before the Court.

Initially, the Court's attention is focused upon the wording of Subsection (9) (b) which sets forth the applicable definition for the term "final average salary"; namely, " such term shall mean his highest average annual compensation earned during any three (3) consecutive years " Under said language, a retiree can select any consecutive three (3) year period, take the average of the annual compensation earned for said three year period and have said average sum utilized as his "final average salary" for computing his retirement benefits.

In the decisions of the lower Courts, it was reasoned that under subsection 302 (9) (b), the term "annual compensation earned" was characterized by the definition of the term "annual compensation" as set forth in subsection 302 (2) (a) of the Retirement and Social Security Law of the State of New York, and that accordingly, termination pay was earned at a rate of three (3) days per year, said payment being earned yearly and deferred or withheld until Petitioner-Petitioner actually retired, and that since subsection 302 (9) (b) referred to the average annual compensation earned during a three consecutive year period, the Petitioner-Petitioner was only entitled to have included in the term "final average salary", pursuant to subsection 302 (9) (b), a sum representative of termination pay that was limited to a three (3) days per year figure multiplied by said three (3) year term.

The fallacy in this reasoning and holding stems from the fact that it totally ignores consideration of the language of sub-paragraph 7 (k) of Petitioner-Petitioner's collective bargaining agreement in interpreting subsection 302 (9) (b) of the Retirement and Social Security Law of the State of New York as well as totally ignoring the introductory language set forth in subsection 302 of the Retirement and Social Security Law of the State of New York when the Court referred to subsection 302 (2) (a) of the Retirement and Social Security Law of the State of New York in its attempt to interpret subsection 302 (9) (b) of the Retirement and Social Security Law of the State of New York.

As is readily seen, the lower Court concluded, contrary to the language of sub-paragraph 7 (k) of the collective bargaining agreement in existence at the time of Petitioner-Petitioner's retirement, that termination pay was earned on a year by year basis, and that the payment of same was "deferred or withheld until Petitioner-Petitioner had satisfied the other requirements of sub-paragraph 7 (k) of the collective bargaining agreement."

Upon review of sub-paragraph 7 (k) of Petitioner-Petitioner's collective bargaining agreement, it becomes obvious that entitlement to termination pay is not realized nor achieved by Petitioner-Petitioner, nor does it vest nor is it earned by him until he fulfills the other specific conditions of said paragraph. In particular, the language of sub-paragraph 7 (k) states that:

> "Upon separation from service, after twenty (20) years, for any reason, other than cause, . . . such employee . . . shall be entitled to cash payment for accumulated terminal leave computed on an entitlement basis of three (3) days for each year of completed service . . ."

As set forth above, sub-paragraph 7 (k) requires that before termination pay is earned by an employee, he must have completed at least twenty (20) years service, retire from service and retire in good standing, that is, not be separated for cause. Until the above are accomplished, an employee has not "earned" the right to receive termination pay. To claim that termination pay vests on a year by year basis and is accumulated until an individual "retires", is contrary to the language of sub-paragraph 7 (k). Certainly, it is not the intent nor the meaning of the language of sub-paragraph 7 (k) to have an employee who terminates his employment after having served for more than twenty (20) years, but is separated from service "for cause" to have a valid claim for accumulated termination pay that supposedly vested on a year by year basis during the period of time in which said employee served in good standing.

For the reasons stated above, Petitioner-Petitioner respectfully submits to the Court that Section 302, Subsection 9 (b) of the Retirement and Social Security Law of the State of New York as interpreted by the lower Court, as a matter of law, is improper and in effect deprives Petitioner-Petitioner of a property right without due process of law.

Weber's Point II

As Petitioner-Petitioner's second point, Petitioner-Petitioner respectfully submits to this Court that his constitutional guarantees as set forth in Article V, Subsection 7 of the New York State Constitution, which prohibit the diminution or impairment of any State retirement benefit, have in fact been violated.

In support of the above, it should be noted by the Court that prior to Respondent-Respondent's recomputing Petitioner-Petitioner's retirement benefits so as to exclude

from said benefits a major portion of the termination pay he received upon retirement. Petitioner-Petitioner's retirement checks, on a monthly basis, for over two (2) year period, reflected the full sum of termination pay received by Petitioner-Petitioner on retirement.

That as a result of receiving almost 24 checks, on a regular basis, there was established a recognizable contractual relationship between Petitioner-Petitioner and the New York State Policemen's and Firemen's Retirement System, the impairment of which is specifically prohibited by Article V, Section 7 of the New York State Constitution which prohibits the diminution or impairment of any State retirement benefit.

Although Special Term referred to the holding in *Kranker* v. *Levitt, supra*, as a basis for concluding that Respondent-Respondent's course of conduct as to the payment to Petitioner-Petitioner of his retirement sum based upon a "final average salary" that included therein the full sum received as termination pay upon retirement was not of sufficient length to constitute a contractual relationship, and whereas the Appellate Division held with regard to *Kranker* v. *Levitt, supra*, that length of time does not determine a contractual relationship but rather the substance thereof is what is relevant, Petitioner-Petitioner respectfully submits to the Court that based upon the teachings in *Kranker* v. *Levitt, supra*, a course of conduct was established between the parties of including termination pay in the term "final average salary" and that the inclusion of the full sum received for termination pay is properly includable in said "final average salary" determination as applicable to Petitioner-Petitioner and that Respondent-Respondent's attempt to recalculate said "final average salary" term thus goes contrary to law and is specifically prohibited by Article V Section 7 of the New York State Constitution.

It should be further noted by the Court that Respondent-Respondent's actions in payment of retirement benefits is one that is highly regulated and supervised according to state law and for Respondent-Respondent to contend that Petitioner-Petitioner's retirement benefits were improperly computed for close to twenty-four (24) months, bears scrutiny by this Court. In addition, Petitioner-Petitioner respectfully submits to the Court that Respondent-Respondent's initial computation of Petitioner-Petitioner's retirement benefits, which include in the term "final average salary" under Section 302 Subsection 9 (b) the total sum received in the form of termination pay upon retirement, did infact reflect Respondent-Respondent's original understanding and implementation of said Section. It was only after the bringing of co-pending litigation, namely the companion *Greenwald* and *Lecci* cases which are currently a part of this Writ, that Respondent-Respondent reversed its interpretation as to the term "final average salary" under Section 302, Subsection 9 (b) and recomputed Petitioner-Petitioner's retirement benefits, said action occurring only after Respondent-Respondent had been placed in a legal dilemma as to the issues raised in the above referenced companion cases. In particular, the Retirement System found itself including in the term "final average salary" under Section 302 Subsection 9 (b) the full sum received as termination pay for retirees retiring in the year 1970, whereas, as to retirees retiring in 1971 under said Section, said term "final average salary" had excluded therefrom the full sum received as termination pay at retirement.

Petitioner-Petitioner does not contend that patent illegal conduct can be made legal merely by having said conduct continue for over a period of time; however, Petitioner-Petitioner does take the position that conduct, encompassing the legal implementation of the language of a State statute, which continues for a significant period of time, does establish a recognizable and contractual

relationship between the parties that is recognizable at law and under the facts and circumstances of this case result in the acknowledgement by Respondent-Respondent of recognized retirement benefits, the impairment of which, is violative of Article V, Section 7 of the New York State Constitution.

Conclusion as to Weber

For the reasons stated above, this court should grant Petitioner-Petitioner's Writ of Certiorari since Respondents-Respondent's actions have violated Petitioner-Petitioner's constitutional guarantees as set forth in the due process clauses of the 5th and 14th Amendments to the United States Constitution as well as having violated Petitioner-Petitioner's constitutional guarantees as set forth under Article V Section 7 of the New York State Constitution.

Respectfully submitted,

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ALLEN R. MORGANSTERN,
Of Counsel

Exhibit A

Order to Show Cause

At a Special Term of the Supreme Court of the State of New York held in and for the county of Albany, in the County Courthouse, Albany, New York on the 4th day of October, 1971.

Present:

Hon. Edward S. Conway
Justice

SUPREME COURT OF THE STATE OF NEW YORK

County of Albany

(Same Title)

Upon the annexed Petition of Edward Lecci, duly sworn to the 3 day of October, 1971, and upon all of the proceedings heretofore had herein, and upon motion of Richard Hartman, attorney for the Petitioner, it is

Ordered, that the Respondent or his attorney show cause before this Court at a Special Term, Part I thereof, to be held at the County Courthouse, City of Albany, New York, on the 8th day of October, 1971, at 9:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard why an order should not be made and entered herein directing the Respondent to comply with the definition of "final average salary" under Section 302 Subdivision 9 (b) of the Retirement and Social Security Law and forthwith recalculate his retirement allowance so as to include all lump sum payments paid by the County of Nassau to the Petitioner in the form of termination pay and pay for unused sick leave, and it is further

Ordered, that service of a copy of this Order to Show Cause and Petition upon which it is based, upon Respon-

Exhibit "A"

Order to Show Cause

dent on or before the 7th day of October, 1971, be deemed good and sufficient service upon Respondent.

Dated: Albany, New York
October 4, 1971.

EDWARD S. CONWAY
Justice of the Supreme Court

Exhibit "A"

Petition

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF ALBANY

(Same Title)

EDWARD LECCI, Petitioner herein, by his attorney, Richard Hartman, complaining of the Respondent, respectfully alleges:

1. That at all of the times hereinafter mentioned, Petitioner was a member of the Police Department County of Nassau, having been appointed to said position on the 16th day of May, 1949 and having had retired on the 2nd day of January, 1971.

2. That at all of the times hereinafter mentioned, Petitioner was never in the employ of the State of New York.

3. That at all times hereinafter meentioned Petitioner by virtue of the fact that he was a policeman employed by the Nassau County Police Department, a participating employer in the New York State Policemen's and Firemen's Retirement System, was a member of the New York State Policemen's and Firemen's Retirement System and entitled to all the benefits thereunder.

4. That at all times hereinafter mentioned, Respondent, Arthur Levitt, is the duly elected Comptroller of the State of New York and the person responsible by law for the Administration of the New York State Policemen's and Firemen's Retirement System.

5. That on the 8th day of March, 1971, a contract between the Nassau County Patrolmen's Benevolent Association and the County of Nassau was duly signed by County Executive Ralph G. Caso on behalf of the County of Nassau

after having been approved by the Nassau County Board of Supervisors. (a copy of said contract is attached hereto and labeled Exhibit 'A')

6. That the Nassau County Patrolmen's Benevolent Association is the certified bargaining agent for all members of the Nassau County Police Department from the rank of Patrolman to Detective Captain.

7. That said contract was made pursuant to the Taylor Law after several months of collective bargaining and was made retroactive so as to affect all members of the bargaining unit who were employed by the Nassau County Police Department on or after January 1, 1971.

8. That the contract benefits resulting from said collective bargaining under the Taylor Law were legal and binding and any attempt by the Respondent to impair said contract benefits via administrative ruling is prohibited by Article V, Section 7 of the New York State Constitution and Article 1, Section 10 of the United State Constitution.

9. That Petitioner was a patrolman in good standing in the Nassau County Police Department until the date of his retirement on January 2, 1971 and entitled to all the benefits contained within the attached contract.

10. That pursuant to Paragraphs 7 m of the 1971 Agreement, Petitioner was entitled upon retirement to termination pay equivalent to three (3) days pay a year for all years served with the Nassau County Police Department prior to his retirement.

11. That Petitioner served 21½ years with the Nassau County Police Department and was therefore paid by the

Exhibit "A"

Petition

County of Nassau, a lump sum cash termination payment calculated by multiplying the number of years served by three days a year.

12. That also pursuant to Paragraph 7 m of the 1971 Agreement Petitioner was entitled upon retirement to maximum of one hundred sixty-five (165) days pay for unused accumulated sick leave.

13. That Petitioner upon retiring was entitled to and paid by the County of Nassau for unused sick leave, an amount equal to one hundred fifty (150) days pay.

14. That Section 302 Subdivision 9 (b) of the New York State Retirement and Social Security Law defines the "final average salary" as:

> "In the case of a member having credit for three years or more of member service, such term shall mean his highest average annual compensation earned during any three consecutive years of member service for which he is credited, provided that a member by written request filed with the comptroller prior to the effective date of retirement and in form satisfactory to the comptroller, may select any other period of three consecutive years of member service for which he is credited."

15. That Petitioner earned and was paid termination pay and sick pay in his final three years and such lump sum payments are includable in the amount from which the final average salary is computed.

16. That Petitioner was notified and his retirement allowance reflects in the checks that he has received that his final average salary is being computed by including only

3 21st of the termination pay and none of the sick pay paid to him by the County of Nassau upon retirement. (a copy of an informal opinion of the counsel to the retirement system explaining their position is attached hereto and labeled Exhibit B)

17. That upon realizing that the computation of his retirement allowance excluded the amounts paid for termination pay and for unused sick leave, Petitioner made application pursuant to Section 374 of the Retirement and Social Security Law for a hearing for redetermination of his application for a recomputation under Section 380 (a) of the Retirement and Social Security Law of his service retirement allowance so as to have his "final average salary" under the "three year" retirement bill, upon which said retirement allowance is based, reflect the inclusion therein of first, the full amount paid to Petitioner upon retirement for termination pay, and second, to additionally reflect the inclusion therein the full amount paid to Petitioner upon retirement for unused sick leave.

18. A hearing was held on August 13, 1971 as a result of Petitioner's said application. The Hon. Simon Silver presided as Hearing Officer. (Copy of the testimony with exhibits presented at the hearing is attached as Appendix C).

19. That on September 8, 1971, the Hon. Simon Silver rendered his decision denying Petitioner's application for recomputation. (copy of the decision is attached as Appendix D)

20. On September 17th, 1971 the Hon. Simon Silver published his "Findings of Fact" and "Conclusions of Law" with respect to his above referenced September 8, 1971 decision. (copy of the "Findings and Conclusions" is attached as Appendix E)

Exhibit "A"

Petition

21. That Petitioner, having exhausted his administrative remedies, now appears before this court asking it to grant the relief contained in the accompanying Order To Show Cause.

22. In particular, Petitioner submits that the definition of "final average salary" under the "three-year" retirement bill provides for the inclusion of all compensation earned and paid during the computation period applicable to Petitioner and does not exclude in the calculation any form of termination pay or sick pay earned and paid during said computation period.

23. The fact that termination pay and sick pay are in fact earned during the computation period applicable to Petitioner, to wit, at the time of retirement, is evident from the fact that entitlement to said payments are contingent upon Petitioner retiring in good standing. (note Exhibits A and F)

24. That the Respondent, as to those members of the Nassau County Police Department retiring under the 1970 collective bargaining agreement, acknowledged the fact that the term "final average salary" included in said definition and reflected same in their retirement allowance, the full amount of termination pay received by said retiree upon retirement and not a reduced percentage thereof. (a copy of that provision of the 1970 contract is attached hereto and labeled Exhibit F)

25. That the provision appearing in the 1971 collective bargaining agreement entered into by the Nassau County Patrolmen's Benevolent Association and the County of Nassau related to termination pay contains for all intended purposes the identical wording to that appearing in the 1970 collective bargaining agreement related thereto and

entered into by the said parties and interpreted by the Respondent as to include within the definition of "final average salary", the total amount paid as termination pay upon retirement.

26. That Respondent's refusal to include in his computation of "final average salary" the full amount of termination paid to Petitioner has no basis in law and is arbitrary, capricious and and an abuse of discretion, especially in view of Respondent's computation of Nassau County Patrolman retirees under their 1970 collective bargaining agreement. Additionally, such action by Respondent acts to diminish and/or impair Petitioner's benefits under the New York State Policemen's and Firemen's Retirement System in direct violation of Article 5, Section 7 of the New York State Constitution.

27. That additionally included in the calculation for Petitioner of his "final average salary" under the "three-year" retirement bill is any amount paid at the time of retirement for accumulated sick pay.

28. That Sections 41(j) and 341 (j) of the Retirement and Social Security Law do not prohibit the inclusion of said sick pay in determining Petitioner's "final average salary" under the three year retirement bill as said sections are applicable only to State employees, and not to Nassau County employees.

29. That Respondent's refusal to include in his computation of "final average salary" the full amount of sick pay paid to Petitioner has no basis in law and is arbitrary, capricious and an abuse of discretion.

30. That Petitioner formerly advised Respondent that his act is in violation of law and Respondent has not altered

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Petition

his arbitrary, capricious and illegal conduct in this matter.

31. That Petitioner has no other adequate remedy of law.

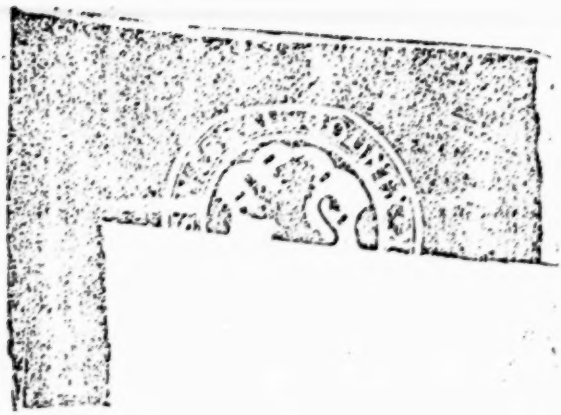
32. That no previous application for the relief sought herein has been made to any Court or Judge.

WHEREFORE, Petitioner demands judgment against the Respondent directing the Respondent to comply with the terms of the New York State Retirement and Social Security Law and to forthwith re-calculate Petitioner's retirement allowance so as to include all lump sum payments paid by the County of Nassau to the Petitioner in the form of termination pay and pay for unused sick leave, and for such other and further relief as to this Court may seem just and proper.

Dated: Mineola, New York
October 3, 1971.

s/
Edward Lecci

(Verified on October 3, 1971)



Exhibit

Exhibit A

Sect

1. Def

2. Ass

3. Cou

4. Ass

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CONTRACT

8. Imp

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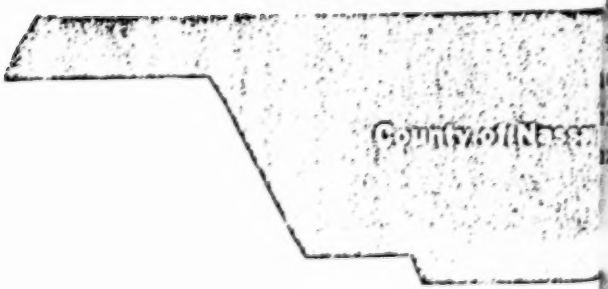

Exhibit "A"

Exhibit A to Petition

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Exhibit "A"

Exhibit A to Petition

Preamble:

The County of Nassau is engaged in furnishing essenti public services vital to the health, safety and welfare of residents. This agreement seeks to assure the orderly and uninterrupted operations of the government by maintaining harmonious relationship between the government and a unit its employees.

Therefore, the COUNTY OF NASSAU and THE PATROLMEN'S BENEVOLENT ASSOCIATION OF THE POLICE DEPARTMENT OF THE COU OF NASSAU, INC., in consideration of the mutual promises a obligations herein assumed, have entered into this agreem this 8th day of March, 1971.

1. Definitions. For purposes of this agreement, the follo definitions shall apply:

a. "Association" means The Patrolmen's Benevolent Association of the Police Department of the County of Nassa

b. "Budget Submission Date" means the second Monday i November.

c. "Comprehensive Liability Coverage" means insuranc claims arising out of a vehicular accident; provided, howe if the employee's negligence contributed to the accident, t he shall receive no payment for any loss of his property. no event shall the County's legal liability to third parti exceed the employee's liability.

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d. "County" means the County of Nassau.

e. "Detective" means an employee who is a detective, tective sergeant, detective lieutenant or a detective captain.

f. 'Disciplinary Proceeding' means a legal proceeding charging an infraction or violation of the law or of departmental rules or regulations commencing with the service of charges and specifications upon the employee and culminating in the conclusion of the departmental trial.

g. 'Employee' means an individual who is a member of the negotiating unit.

h. 'Grievance' means any dispute between the Association or employee and the County with respect only to the meaning or interpretation of a provision of this agreement. It shall not include disciplinary proceedings or any other matters which are reviewable under administrative procedures established by law or the rules of the Nassau County Civil Service Commission.

i. 'Negotiating Unit' means all employees included in the certification of representative and order to negotiate issued by PERB on February 13, 1968, which certificate is made a part hereof and attached as Schedule 'A'.

j. 'PLRB' means the Nassau County Public Employment Relations Board.

k. 'President' means the President of The Patrolmen's Benevolent Association of the Police Department of the County of Nassau, Inc.

2. The Association. The Association has been duly certified as the negotiating representative of the negotiating unit by

an order of PERB dated February 13, 1968 attached hereto a[s] Schedule "A". The County recognizes the Association as the exclusive and unchallenged negotiating representative for collective negotiation with respect to rates of pay, salari[es] hours and other terms and conditions of employment for all [of] the employees in the negotiating unit for the period of thi[s] agreement.

3. The County. Except as limited by this agreement, the County reserves the right to determine the standards of ser[vice] to be offered by its various agencies; to set the standards [of] selection for employment; to direct its employees; to regul[ate] work schedules; to take disciplinary action; to relieve its employees from duty because of lack of work or for other legitimate reasons; to maintain the efficiency of governmen[tal] operations; to determine the methods, means and personnel b[y] which governmental operations are to be conducted; to deter[mine] the content of job classification; to take all necessary actions to carry out its mission in emergencies; and to exe[rcise] complete control and discretion over its organization and t[he] technology of performing its work.

4. Association Activities. Both parties mutually agree tha[t]

a. There shall be no interference with the right of employees to become or continue as members of the Associatio[n]

b. There shall be no discrimination, restraint or coercion against any employee because of membership in or l[awful] activities on behalf of the Association.

c. There shall be no intimidation or coercion of employees into joining the Association or continuing their membership therein.

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d. There shall be no Association activity on County time except as noted for bulletin boards.

e. There shall be no strike, or other concerted stoppage of work or slowdown by any employee; nor shall any officer or representative of the Association authorize, instigate, aid or condone any such activity.

f. The President shall be permitted access to County property at reasonable times when necessary to transact legitimate association business pertaining to the administration of this agreement after notice to the Commissioner of Police or his designated representative.

g. County bulletin boards may be used to post Association notices after being approved, in writing, by the Commissioner of Police or his designated representative. Notices from the Association shall be signed by the President, Vice-President, Secretary or Treasurer. All notices posted by the Association are the responsibility of the officials of the Association. Unsigned notices may not be posted. Defacing, adding to or writing over any general notice or posting unofficial bulletins or notices or any that are offensive shall be prohibited. The following notices, however, do not need approval by the Commissioner of Police or his designated representative:

(1) Notices of Association recreational or social affairs.

(2) Notices of Association elections and meetings.

(3) Notices of Association appointments and results of Association elections.

Exhibit "A"

Exhibit A to Petition

All notices shall be promptly removed after they have served their purpose. No provision of this agreement shall be construed to permit the posting of any political, advertising or controversial matter on bulletin boards or elsewhere upon County property. Notices shall not exceed 8-1/2" by 11" in size and shall be posted in a manner so as not to obstruct other notices. The County shall provide, at its expense and for the sole use of the Association, sufficient bulletin boards size 4' by 6', enclosed in glass and with locks, for these notices.

h. The County shall deduct from the bi-weekly wages of each employee who has authorized the same, Association dues, assessments, initiation fees, group life insurance premiums, group accident and health insurance premiums of the Association and forward the total amount of such deductions forthwith to the Association. Such payroll deduction authorizations shall be in writing, signed by the employee and in the form generally in use by the Association. The amounts for such deductions shall become effective only upon filing with the County Comptroller a certified copy of the resolution of the Association or other document authorizing such amount. Dues shall be a unified amount for all employees. Such payroll deduction authorizations shall take effect fifteen (15) days after receipt thereof by the County Comptroller. The County shall not be liable to the Association by reason of the requirements of this subdivision for the remittance or payment of any sum other than that constituting the deductions agreed to be made from the employee's wages.

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i. The County will not permit any other employee organization to hold meetings on County property at any time with reference to employees in the negotiating unit. This shall not be construed to prohibit any other meeting of employee organizations with reference to any subject not within the scope of this agreement.

j. The County shall furnish the Association with IBM cards for all employees, containing the same data on such cards used by the Police Department for recording names, addresses and commands of employees, beginning April 1, 1971 and every three months thereafter, all changes of such cards.

5. Grievance Procedures. a. Every employee shall have the right to present his grievances in accordance with the procedures described herein, with or without a representative of the Association, free from interference, coercion, restraint, discrimination or reprisal.

Step 1. An employee who feels that he has been aggrieved may orally present his grievance to his Commanding Officer who shall carefully consider the matter; and within three (3) days thereafter make a determination and advise the employee of the decision.

Step 2. If the grievance is not satisfactorily adjusted in Step 1, an employee may, not later than ten (10) days after notification of the decision provided for in Step 1, submit the matter in writing to either the Chief of Detectives, Chief of District or Chief of Headquarters, based on his command affiliation. The Chief having command jurisdiction shall give the employee, and if the employee

desires, a representative of one of the three Department li organizations, an opportunity to fully discuss the matter. The Chief having command jurisdiction shall, within seven (days after the matter has been fully presented, carefully consider the matter, make a determination and notify both t employee and the employee's Commanding Officer of his decis

Step 3. If the grievance is not satisfactorily adjusted in Step 2, an employee may present the matter in w to the Grievance Board of the Police Department for determi The Grievance Board of the Police Department shall be a thr member board. One member shall be appointed by the Associa Another member shall be appointed by the Commissioner of Po The third member shall be the Chairman of the Committee on Public Safety of the Board of Supervisors or if mutually ag to by the Association and the Commissioner of Police, any c individual. The employee shall present his grievance, with ten (10) days after notification of the decision provided f in Step 2 by requesting a hearing before this Grievance Boa The Grievance Board shall make its determination within te days after the matter is presented to it and after appropria consultation with any or all parties to the grievance. The employee may have a representative of one of the three departmental line organizations present the matter on his be The decision of the Grievance Board shall be advisory only a shall be submitted to the Commissioner of Police. The Comm of Police shall, within ten (10) days after receipt of thi decision make a determination. His determination shall be

binding and final with regard to all grievances relating to administrative matters.

b. For the purpose of grievance procedures:

(1) Failure at any step of the procedure provided herein to communicate a decision on a grievance within the specified time limits shall permit the employee to proceed to the next step.

(2) Failure at any step of this procedure to appeal a grievance to the next step within the specified time limits shall be deemed to be a waiver of the right to appeal.

(3) The term "day" means working day.

(4) The Association may submit a grievance, in writing, providing it does not merely affect an individual with step 3 as the initial step.

c. Conferences and hearings held under the procedure provided herein shall be conducted at a time and place which will afford a fair and reasonable opportunity for all persons entitled to be present at such conference or hearing. When such conference or hearing is held during working hours, all individuals necessary for the conference or hearing shall be excused without loss of pay for that purpose.

6. Disciplinary Procedures. a. Notwithstanding the provisions of any other section of this agreement, disciplinary procedures shall be the same as are presently in effect and pursuant to law.

b. The employee under internal investigation shall have the right to have present during the period of interrogation a duly designated representative of the Association who has been previously certified by the Association on a list submitted to

the Commissioner of Police and is a member of the negotiating unit which list shall provide for the designation on precinct or unit level. The employee shall be given a reasonable opportunity to notify such duly designated representative but the period of interrogation shall not be delayed for more than one hour because such duly designated representative is unable to be present. This right to such a duly designated representative during the period of interrogation shall not apply to internal investigations of complaints of minor violations of the Rules and Regulations of the Police Department of the County, such as absence from post, failure to signal, failure to make entries, loss of equipment, etc. Such duly designated representative, while having the right to be present during the period of interrogation, shall not be permitted to interfere with or interrupt the interrogation. The representative, however, shall have the right to confer with and advise the employee only before and after interrogation.

7. Employee Benefits. a. Salaries. (1) The salary schedule shall be as follows:

Patrolman	1971 Salary	1972 Salary	Period of Service
			Commenced on or after 1/1/71 or 1/1/72 respectively
1	$ 9,129	$ 9,859	
2	9,879	10,669	One year of service or more
3	10,765	11,626	Two years of service or more
4	11,668	12,601	Three years of service or more
5	12,290	13,273	Four years of service or more

Exhibit "A"

Exhibit A to Petition

Detective			
1	12,967	14,235	Less than one year of service
2	13,463	14,780	One year of service or more
3	14,033	15,406	Two years of service or more
Sergeant	14,634	15,805	Any period of service
Detective Sergeant	14,985	16,718	Any period of service
Lieutenant	15,995	17,846	Any period of service
Detective Lieutenant	16,676	18,605	Any period of service
Captain	17,560	19,590	Any period of service
Detective Captain	18,334	20,444	Any period of service

(2) Annual increments for employees, where appropriate, shall be given on the following January 1st of each calendar year with a full year's service being credited for the calendar year of appointment. All payments of salary shall be based on a 261 day work year.

b. Longevity. In addition to the salary provided in subdivision a of this section, an employee shall be entitled to a longevity payment of three hundred (300) dollars after eight (8) years of completed service, three hundred fifty (350) dollars more after ten (10) years of completed service, and three hundred fifty (350) dollars more after fifteen (15) years of completed service, for a total of one thousand (1,000) dollars after such fifteen (15) years on or after January 1, 1972, the longevity payment after eight (8) years shall be reduced to six (6) years of completed service. Years of completed service shall only include time served as a member of the Police Force

of the County on a full time pay status or while on a military leave of absence pursuant to Section 243 of the Military Law of New York. Longevity payments shall become effective on the first day of the next bi-weekly pay period following the employee's anniversary date of such completed service. For employees who have completed eight (8) years of service prior to January 1, 1970, for purposes of longevity payments, the anniversary date shall be January 1st of each year.

c. Required Equipment Allowance. An employee shall receive an equipment allowance towards the cost of required equipment not furnished by the Police Department in the sum of one hundred fifty (150) dollars for each calendar year beginning in 1972. Payments shall be made as follows:

(1) An employee, who is a member of the Police Force from January 1st through July 1st of the calendar year, shall receive a payment of one hundred fifty (150) dollars on or before the last day of the first complete bi-weekly pay period in July of the Calendar year.

(2) An employee, who is not a member of the Police Force from January 1st through July 1st of the calendar year but for six (6) months or less during a calendar year, shall receive a payment of seventy-five (75) dollars on or before December 31st of the calendar year.

(3) An employee, who is not a member of the Police Force from January 1st through July 1st of the calendar year but for more than six (6) months during a calendar year, shall receive a payment of one hundred fifty (150) dollars on or before December 31st of the calendar year.

Exhibit "A"

Exhibit A to Petition

d. Basic Workweek and Tour of Duty. (1) Except as provided in this subdivision, the basic workweek for employees shall be not more than forty (40) hours and the basic tour of duty shall be eight (8) hours which includes forty-five (45) minutes of paid meal time a day.

(2) Detectives shall have the basic workweek provided in Schedule "B" which may include a tour of duty of twelve (12) hours.

(3) Employees will be excused for a forty-five (45) minute meal period during each tour of duty.

(4) Employees who are receiving training from the Recruit Training Bureau shall have a basic workweek of forty-eight (48) hours, consisting of tours of duty of eight (8) hours.

(5) Employees who are detailed on assignments concerning out-of-state renditions, extraditions, or investigations, shall receive credit for eight (8) hours for each full day on such assignment regardless of the hours actually worked if such assignment extends beyond one calendar day; provided, however, if such assignment is completed in one calendar day, all hours actually worked shall be credited to the employee.

(6) Employees participating in voluntary activities sanctioned by the Police Department such as softball, band, pistol competition, bowling, etc. shall not receive credit as time worked for such activities except when granted by the Commissioner of Police.

(7) All employees in the uniform police force, who work a rotating schedule, shall have their schedule rotated on

a five (5) day and seventy-two (72) hour basis. A "rotating schedule" is a schedule which involves the assignment to a particular detail which requires on-duty coverage on a full twenty-four (24) hour basis.

(8) Court appearances, uniform fittings and medical examinations of employees shall be credited as actual time worked by an employee in his basic workweek an tour of duty.

(9) Employees attending a conferenc convention of municipal officers or employees or a school or seminar for the betterment of municipal government, whether the same be official or unofficial, when authorized in writing by the Commissioner of Police, shall receive credit for eight (8) hours of each full day on such assignment regardless of the hours worked.

e. Overtime. (1) Work in excess of the employee's basic workweek or tour of duty is overtime. Overtime shall be paid by the following rules: It shall be paid either as paid overtime compensation or compensatory time. Paid overtime compensation shall be at the rate of the employee's base annual salary divided by 1392 for each hour of overtime worked. (1392 is time and one-half based on an eight (8) hour day and 261 day work year. Compensatory time shall be computed at the rate of time and one-half. The employees shall have the discretion as to whether overtime shall be paid overtime compensation or compensatory time and shall exercise such discretion either immediately before working such overtime or immediately after completing the working of such overtime and notify his Commanding Officer of his decision. An employee may

accumulate no more than forty (40) hours of overtime payable as sixty (60) hours of compensatory time and shall receive only paid overtime compensation for all hours in excess of such forty (40) hours.

(2) The County has the right to order an employee to perform overtime.

(3) An employee attending his own award or promotion ceremonies shall not receive any overtime because of hours directly or indirectly involved therein.

(4) An employee reporting back to duty after being on sick leave shall receive no overtime because of hours directly or indirectly involved therein.

(5) An employee ordered to report for a physical examination while he is on extended sick leave for more than thirty (30) days shall receive no credit for time worked or overtime for any hours directly or indirectly involved therein.

(6) An employee attending his own disciplinary proceeding shall not receive any overtime because of hours directly or indirectly involved therein, except if found innocent on all charges.

(7) For all employees, compensatory time shall be granted in the calendar year it is earned except that unused overtime up to a total of forty (40) hours of overtime payable as sixty (60) hours of compensatory time may be carried over and granted in the following year.

(8) For bookkeeping purposes, compensatory time shall be recorded on a first-in, first-out basis. The employee shall be able to split his choice of recording earned overtime between paid overtime compensation and compensatory time.

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Exhibit A to Petition

(9) Compensatory time shall be granted only when the employee and his Commanding Officer agree and only in eight (8) hour units, except when otherwise mutually agreed between them.

(10) An employee's workweek or chart shall not be altered during that workweek for the sole purpose of avoiding overtime compensation. Alterations for police emergencies, except with regard to church or school crossings, are permitted provided, however, any such alteration for church or school crossings made prior to the date this agreement is signed by the Association shall also be permitted. In addition, any alteration made at the request of the employee and approved by his Commanding Officer shall also be permitted.

f. Holiday Pay. (1) Employees shall receive holiday pay as provided in Ordinance No. 95-1964, as amended, which shall be amended to add one additional holiday in 1972, to be Flag Day, June 14th. In no event shall there be less than eleven (11) holidays in the 1971 calendar year and twelve (12) holidays in the calendar years thereafter.

(2) For an employee who actually works on a day observed as a holiday and is his regularly scheduled work day, his compensation shall include, in addition to his regular day's pay and holiday pay provided in subsection 1 for all hours worked during a tour of duty compensation payable at the rate of his base annual salary divided by 4176 for each hour worked. For all hours worked in excess of his tour of duty such hours shall be payable as overtime.

(3) For an employee who has a regularly scheduled word day on a day observed as a holiday and is ordered not to work on such day, he shall receive the same benefits as provided in subsection 2.

(4) For an employee who does not have a regularly scheduled work day on a day observed as a holiday, but actually works on such a day, his compensation shall include, in addition to a regular day's pay and holiday pay provided in subsection 1, for all hours worked during a tour of duty compensation pay at the same basis as overtime compensation for all employees.

g. Mileage Allowance. (1) General Rule. An employee shall not receive a mileage allowance for reporting to duty but shall receive reimbursement for mileage incurred while traveling on County business after reporting to duty in his automobile in accordance with the schedule of mileage distances determined by the County Comptroller for such travel. The mileage allowance is eleven (11) cents per mile and paid on a claim form.

(2) Employees who are recalled. An employee who is recalled shall receive a mileage allowance computed on the round trip distance from his home to the place he was ordered to report to duty as determined from such County Comptroller's schedule.

(3) Employees who are court recalled. Employees, who are court recalled, shall be paid a mileage allowance on the same basis as if they were recalled.

h. Special Days (1) Special events shall be payable pursuant to Ordinance No. 158-1964.

(2) When the County Executive, or in his absence, his designated representative, declares that an emergency exists because adverse weather has impaired the use of available transportation facilities or for other reasons that affect the health and welfare of officers or employees of the County and directs either not to report to work or to leave work, such absence shall be deemed an absence with pay as provided in Ordinance No. 34-1969, as amended. Employees who have reported to work prior to such County Executive's declaration of an emergency or actually work thereafter shall have such time worked payable at the option of the Commissioner of Police on either a cash basis as required for overtime or compensatory time at the rate of one and one-half times (1-1/2) such time worked.

i. Recall. (1) Recall is a communication by an employee's Commanding Officer to him while off-duty directing him to proceed immediately to engage in work or to report for such work at a designated time.

(2) An employee recalled after he has finished his tour of duty and is placed on-duty shall receive a minimum of four (4) hours credited as time worked. An employee recalled but not placed on-duty shall be credited with two (2) hours as time worked.

(3) Any time credited on a recall shall be compensated on the same basis as overtime.

(4) The County shall provide comprehensive liability coverage for an employee who is recalled covering both one-half

hour before the time he is due to report for recall and one-half hour after the time he is relieved from duty on the recall. On or after January 1, 1972, such coverage shall be increased to one hour. This subdivision shall not be construed to relieve the County from its duty to provide comprehensive liability coverage for employees regularly on-duty in their capacity as police officers.

(5) In addition to any other benefits provided in this subdivision, an employee shall be credited with travel time consisting of both one-half hour before the time he is due to report for recall and one-half hour after the time he is relieved from duty on the recall. On or after January 1, 1972, such travel time shall be increased to one hour. All travel time shall be paid in money.

j. Court Recall. (1) Court recall is a communication by an authorized individual to the employee directing him to report for work while otherwise off-duty at a designated time with regard to work involving a court proceeding or relating thereto.

(2) Before July 1, 1971, court recall shall be compensated in the same manner that existed on December 31, 1970.

(3) On or after July 1, 1971, court recall shall be compensated in accordance with the following rules:

(a) If the court recall is cancelled by notifying the employee more than seventy-two (72) hours before the designated time, then the employee shall receive no compensation.

(b) If the court recall is (1) not cancelled by notifying the employee more than seventy-two (72) hours before the designated time or at any time seventy-two (72) hours or less

before the designated time and (2) the employee actually re for such work, then the employee shall be credited with a minimum of four (4) hours as time worked or the actual time worked if four (4) hours or more. If the employee does not actually report for such work, he shall receive no compensa

(c) If the court recall is cancelled by notifying the employee seventy-two (72) hours or less before designated time, the employee shall immediately notify his Commanding Officer or other individual if the Commissioner o Police so designates in the Rules and Regulations of the Po Department. The employee shall be required to report to du as directed by such individual he is required to notify, for minimum of four (4) hours of work all of which shall be with eight (8) hours after such designated time, unless he volunt or actually does not so report to work, in which case, he sh receive no compensation for the court recall.

(d) Notice to an employee under this subsect may be to him personally or to an individual at the place t employee has furnished his Commanding Officer or other indi if the Commissioner of Police so designates in the Rules an Regulations of the Police Department. Notice is deemed made an unsuccessful attempt at actual notification is made at su place unless the employee was actually on-duty at the time of such unsuccessful attempt.

(4) Any time credited on a court recall shall be compensated on the same basis as overtime.

(5) The County shall provide comprehensive liabil coverage for an employee who is court recalled covering both

one-half hour before the time he is due to report for recall and one-half hour after the time he is relieved from duty on the court recall. On or after January 1, 1972, such coverage shall be increased to one hour. This subdivision shall not be construed to relieve the County from its duty to provide comprehensive liability coverage for employees regularly on-duty in their capacity as police officers.

(6) In addition to any other benefits provided in this subdivision, an employee shall be credited with travel time consisting of both one-half hour before the time he is due to report for court recall and one-half hour after the time he is relieved from duty on the court recall. On or after January 1, 1972, such travel time shall be increased to one hour. All travel time shall be paid in money.

k. Standby. (1) An employee who is ordered to be on standby shall be paid at the rate of two (2) hours for every eight (8) hours he actually remains on standby. There shall be no voluntary standby. The real rate shall be computed by dividing the base annual salary by 2088. Compensation for standby time shall be pro-rated but not less than one-half (½) hour for each continuous period of standby. For purposes of this subdivision, standby is time that an employee is not actually on duty but is continuously available to report to duty within one hour of receiving notification and the employee is required to insure his availability by furnishing to his Commanding Officer a place where he may be so notified. For purposes of standby no employee shall be required to stay at home.

Exhibit "A"

Exhibit A to Petition

(2) On or after July 1, 1971, no employee shall be required to stand by with regard to work involving a court proceeding or relating thereto.

1. Vacation, Sick Leave and Leaves of Absences. (1) Except as provided herein, vacations, sick leave and leaves of absence shall be as presently provided in the Rules and Regulations of the Police Department.

(2) For employees in service prior to July 1st in a calendar year, two (2) days of personal leave shall be granted for each calendar year. For employees whose initial day of service is on or after July 1st in a calendar year, one (1) day of personal leave shall be granted for the calendar year. On or after January 1, 1972, such personal leave shall be increased to five (5) and two and a half (2½) days respectively. Personal leave may not be carried over from one calendar year to the next and shall be applied for on Police Department Form Number 198.

(3) Sick leave. (a) All sick leave shall be granted and deducted on a working day basis.

(b) All sick leave granted or accumulated shall be converted from calendar days to working days on a one-for-one basis.

(c) An employee on sick leave may not leave his residence or place of confinement and may be visited by a supervising officer only between the hours of 9:00 A.M. to 5:00 P.M. on a day he was regularly scheduled to have a tour of duty, except as otherwise reasonably directed by the Police Surgeon.

Exhibit "A"

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(4) Employees shall receive vacation time on a working day basis. Employees with less than five (5) years of continuous service shall receive twenty (20) working days during each calendar year. Employees with five (5) or more years of continuous service shall receive twenty-seven (27) working days during each calendar year. An employee shall work one continuous year of service before receiving his vacation time. Thereafter, vacation time shall be credited on on January 1st of each year. In addition, his additional credits for five (5) or more years of continuous service shall be only credited on his anniversary date of such fifth year.

(5) An employee who is on vacation and recalled by his Commanding Officer shall be reimbursed by the department for all expenses incurred and not otherwise recoverable on behalf of himself and family relating to his vacation. An employee who has placed a deposit for vacation accommodations and is ordered by his Commanding Officer to cancel his vacation will be reimbursed for any loss of deposit.

(6) Vacation time shall not be lost because of an employee's illness, providing the illness does not continue for more than one continuous year. Such vacation time may be carried over and taken during the following calendar year. However, a member on vacation may not sign on sick leave until the termination of his vacation period.

m. Termination Pay. Upon separation from service, after twenty (20) years, for any reason, other than cause, or upon the death in service of any employee or upon retirement

Exhibit "A"

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qualifying for either ordinary or accidental disability unde the Retirement and Social Security Law of New York State, a employee or his legal representative, shall be entitled to cash payment for accumulated terminal leave computed on an entitlement basis of three (3) days for each year of comple service. On or after January 1, 1972 such entitlements sha be computed on the basis of four (4) days for each year of completed service. Year of completed service shall only include time served as a member of the Police Force of the County on a full pay status, while on a Military leave of absence pursuant to Section 243 of the Military Law of New York State and time actually credited toward retirement benefits for service during World War II as provided in Ordinance No. 298-1970. In addition, an employee or his leg representative entitled to cash payment for accumulated terminal leave, shall be paid in a lump sum the value of his accumulated and unused sick leave to the extent of fifty (5 percent thereof, but not to exceed a total of one hundred sixty-five (165) working days.

n. Health Insurance. (1) The County shall pay the fu contribution of all health insurance plans authorized pursua to Article XI of the Civil Service Law during the 1971 and 1972 calendar year.

(2) The County shall select a dental plan pursuant to Section 92-a of the General Municipal Law. The County sha contribute one hundred (100) dollars a year, pro-rated equall when premiums are due towards the premium of each employee wh elects the plan.

Exhibit "A"

Exhibit A to Petition

(3) If any other negotiating unit of the County shall receive any health or dental benefits which are not provided in this agreement, the Association shall also receive such health or dental benefit.

o. Night Differential. Employees shall receive an additional differential compensation in accordance with the following rules and Department of Labor directive attached hereto as Schedule "C":

(1) An employee, at least half of whose shift is between 4:00 P.M. and 8:00 A.M., shall receive additional differential compensation of fifteen (15) cents per hour for each hour actually worked, regardless of whether such hours are between 4:00 P.M. and 8:00 A.M.

(2) In lieu of hours actually worked, employees who are on authorized leave, such as sick leave, personal leave, vacation time, compensatory time or a paid holiday, shall likewise receive the additional differential compensation provided for herein, if such employee, by reason of his work schedule would otherwise have worked during such hours for which the said additional differential compensation would be paid in pursuance of this subdivision.

(3) On or after January 1, 1972, such additional differential compensation shall be increased to twenty-five (25) cents per hour.

p. Legislative Program. The County and the Association agree that the County will support any legislation which is recommended and approved by the Association, the Commissioner

of Police, and the County Executive, and, if a Home Rule Ordinance is required, by the Board of Supervisors.

q. Clothing Allowance. All uniforms necessary for an employee to perform his duty as a uniformed officer shall be furnished by the County. In addition any employee assigned to perform duty in plain clothes by order of the Commissioner of Police for a continuous period of not less than three (3) months shall receive additional compensation in lieu of clothing pro-rated bi-weekly on a basis of three hundred (300) dollars per calendar year.

r. An employee, upon application to and with the approval of the Commissioner of Police, may examine his Force Record on file with the Personnel and Accounting Bureau of the Police Department; provided, however, any matter the Commissioner of Police, in his sole discretion, deems confidential shall not be subject to such examination.

s. Comprehensive Liability Insurance. The County shall provide comprehensive liability coverage for employees regularly on-duty in their capacity as police officers either in a County or a private vehicle.

t. The agreement, except the schedule of detective charts will be furnished to all present and new employees at the expense of the County.

8. Impasse Procedures. The parties hereto wish to avail themselves of the right to agree to their own procedures as permitted under the law and, therefore, mutually agree upon the impasse procedures set forth herein.

Exhibit "A"

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The parties agree to share the cost of any mediators or fact-finders chosen to aid in the resolving of any impasse that may arise in future negotiations.

An impasse shall not be deemed to exist because the parties fail to achieve an agreement sixty (60) days prior to the budget submission date. The parties hereby agree to continue with the negotiations into the sixty (60) days period before the budget submission date. If one of the parties believes an impasse has occurred, it shall request the other to join in choosing a mediator by mutual agreement. If the parties cannot agree on a mediator within two (2) days after such request, then, upon notification by either party, the PERB shall submit to the parties a list of seven (7) persons who are residents of the County. The parties shall determine by the tossing of a coin, who shall have the right to remove the first name from such list and the parties shall alternately remove names from such list until one name is left. This remaining person shall be the mediator.

If the mediator does not effect a settlement within ten (10) days of his appointment, the dispute shall be submitted to a Fact-Finding Board of three (3) members. One (1) member shall be chosen by the County, one (1) member by the Association and one (1) member by mutual agreement of the first two (2) fact-finders chosen. If the first two (2) fact-finders cannot mutually agree to the third fact-finder within three (3) days after their selection, then the PERB shall submit to these two (2) members a list of seven (7) qualified persons who are County residents, and the two (2) members shall, by the toss of

Exhibit "A"

Exhibit A to Petition

a coin, determine who shall remove the first name from such list; and the parties shall alternately remove names from such list until one (1) name is left. Such last remaining named person shall be the third member and chairman of the Fact-Finding Board.

If the dispute is not resolved at least fifteen (15) days prior to the budget submission date, the Fact-Finding Board, acting by a majority of its members, shall immediately transmit its findings of fact and recommendations for resolving the dispute to the County Executive and to the President and shall simultaneously make public such findings and recommendations.

If the dispute reaches a point where findings of fact and recommendations are made public by the Fact-Finding Board established pursuant to these procedures and the impasse continues, the PERB shall take whatever steps it deems appropriate to resolve the dispute, including the making of recommendations after giving due consideration to the findings of fact and recommendations of such Fact-Finding Board, but no further fact-finding board shall be appointed.

In the event that either party does not accept in whole or in part the recommendations of the Fact-Finding Board, the County Executive shall, within ten (10) days after receipt of the findings of fact and recommendations of the Fact-Finding Board, submit to the County Board of Supervisors a copy of the findings of fact and recommendations of the Fact-Finding Board together with his recommendations for settling the dispute, and the Association may submit to such legislative body its recommendations for settling the dispute.

Exhibit "A"

Exhibit A to Petition

9. Employee representatives. a. It is hereby deemed to be in the best interests of the County that the President be permitted to perform his duties as an employee for the basic workweek in his capacity as President and as a member of the negotiating unit, and that the performance in this capacity shall be deemed actual hours worked on duty.

b. An employee who is chief representative of supervisory officers (rank of Sergeant or above) as certified by the President to the Commissioner of Police, shall be credited with eight (8) hours weekly towards his basic workweek for the performance in his capacity as such chief representative. An employee who is chief representative of detectives (Detective rank only) as certified by the President to the Commissioner of Police, shall be credited with eight (8) hours weekly towards his basic workweek for the performance in his capacity as such chief representative. The chief representatives and each of their two assistants shall be assigned a day shift at their option but the assignment of duties shall be made by their Commanding Officer. This option may be exercised only twice in a calendar year. In addition, the chief representatives may not accumulate more than twenty-four (24) hours of such time.

c. The six officers of the Association, other than the President, as certified by the President to the Commissioner of Police shall be assigned a day shift Monday through Friday at their option, but the assignment of duties shall be made by their Commanding Officer. This option may be exercised only twice in a calendar year.

d. The Association shall be entitled to have a negotiating committee for the purpose of collective negotiations regarding this agreement or any other agreement. Employees who are members of this negotiating committee shall be granted a leave of absence with pay while actually involved in collective negotiations. The negotiating committee may not exceed nine employees and the Association shall furnish to the Commission of Police a list of the members of the negotiating committee.

e. A maximum of ten (10) days leave of absence shall be granted to the designated representative of the Association for legislative work in behalf of the Association and if there is more than one (1) representative the ten (10) days leave time may be apportioned between them but in no event shall the total of such leave time exceed the ten (10) day maximum. Application for Legislative Leave shall be made pursuant to the pertinent provisions of the Rules and Regulations controlling leave of absence on Police Department form No. 198.

10. PERB Ordinance. As required by Section 7-A of Ordinance No. 228-1967, as amended, "IT IS AGREED BY AND BETWEEN THE PARTIES THAT ANY PROVISION OF THIS AGREEMENT REQUIRING LEGISLATIVE ACTION TO PERMIT ITS IMPLEMENTATION BY AMENDMENT OF LAW OR BY PROVIDING THE ADDITIONAL FUNDS THEREFOR, SHALL NOT BECOME EFFECTIVE UNTIL THE APPROPRIATE LEGISLATIVE BODY HAS GIVEN APPROVAL."

11. Contract Renewal. This agreement shall be effective from January 1, 1971, and shall continue in full force and effect to and including December 31, 1972.

Exhibit "A"

Exhibit A to Petition

... enforceable clause. If any provision of this agreement shall be found to be illegal, the County and the Association shall mutually agree to replace that provision with another one which is substantially equal in monetary value.

COUNTY OF NASSAU

... County Executive

THE PATROLMEN'S BENEVOLENT ASSOCIATION OF THE POLICE DEPARTMENT OF THE COUNTY OF NASSAU, INC.

Daniel E. Greenwald
President

FORM APPROVED:

... County Attorney

Exhibit "A"

Exhibit A to Petition

STATE OF NEW YORK)
COUNTY OF NASSAU) ss.:

On this 8th day of ~~February~~ March, 1971, before me appeared RALPH G. CASO, County Executive of the County the corporation described in and who executed the fore instrument, to me known and known to me to be such Co Executive, and he being by me duly sworn, did depose a That he is the County Executive of Nassau County; that the corporate seal of said County of Nassau; that the affixed to said instrument is such corporate seal; that thereto affixed pursuant to resolution of the Board of

Harold E. Co
Notary Public
HAROLD E. COLLINS
Notary Public, State of New York
No. 30-5764300
Qualified in Nassau County
Commission Expires March 30, 19

STATE OF NEW YORK)
COUNTY OF NASSAU) ss.:

On this 24th day of February, 1971, before me came DANIEL GREENWALD to me known, who, being by me du did depose and say: That he resides at 250 East Avenue Valley Stream, New York and that he is the President Patrolmen's Benevolent Association of the Police Depa the County of Nassau, Inc., the corporation described which executed the above instrument; that he knows the corporation; that the seal affixed to said instrument corporate seal; that it was so affixed by order of the Directors of said corporation, and that he signed his by like order.

William O'Brien
Notary Public

WILL
NOTARY PUBLIC, State of New York
No. 24-[illegible]
Qualified in Nassau
Commission Expires [illegible]

Exhibit "A"

Exhibit A to Petition

SCHEDULE "A"

Exhibit "A"

Exhibit A to Petition

COUNTY OF NASSAU
PUBLIC EMPLOYMENT RELATIONS BOARD

IN THE MATTER OF THE PETITION OF THE PATROLMEN'S BENEVOLENT ASSOCIATION OF THE POLICE DEPARTMENT OF THE COUNTY OF NASSAU, INC., AN EMPLOYEES' ORGANIZATION FOR RECOGNITION AS THE DULY AUTHORIZED REPRESENTATIVE OF CERTAIN DESIGNATED EMPLOYEES OF THE COUNTY OF NASSAU, A PUBLIC EMPLOYER	:	Case No. I

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

The Patrolmen's Benevolent Association of the Police Department of the County of Nassau, Inc., having applied to the Nassau County Public Employment Relations Board for certification as employee organization to represent members of the Police Department of the County of Nassau in the unit hereinafter described; and the Board, upon due consideration of such petition and all of the facts and evidence submitted in support thereof, having certified the Patrolmen's Benevolent Association of the Police Department of the County of Nassau, Inc., to be an employee organization within the meaning of Section 201 of Article 14 of the Civil Service Law and the unit of employees to be an appropriate one under the terms of such statute;

Pursuant to the authority vested in the Board by the Public Employees' Fair Employment Act, and Ordinance No. 228/1967 of the Board of Supervisors of the County of Nassau, as amended;

IT IS HEREBY CERTIFIED that

THE PATROLMEN'S BENEVOLENT ASSOCIATION OF THE POLICE DEPARTMENT OF THE COUNTY OF NASSAU, INC.

has been designated and selected by a majority of the employees of the above named public employer, in the unit described herein as their representative for the purpose of collective negotiation and the settlement of grievances.

Exhibit "A"

Exhibit A to Petition

SCHEDULE "B"

(Omitted - Detective Charts)

Exhibit "A"

Exhibit A to Petition

Unit: Those members of the Police force in the rank of Captain, Lieutenant, Sergeant, Detective, Patrolman and Policewoman.

Further, IT IS ORDERED that the above named public employer shall negotiate collectively with

THE PATROLMEN'S BENEVOLENT ASSOCIATION OF THE POLICE DEPARTMENT OF THE COUNTY OF NASSAU, INC.

and if agreement is reached with regard to the terms and conditions of employment, and the determination and administration of grievances, such agreement shall be reduced to writing.

Signed on the 13th day of February, 1968.

On behalf of the
Public Employment Relations Board

Chairman

Exhibit "A"

Exhibit A to Petition

SCHEDULE "C"

A-48

Exhibit "A"

Exhibit A to Petition

COUNTY OF NASSAU

INTER-DEPARTMENTAL MEMO

Date August 2[illegible]

To : All Elected Officials, Agency and Department Heads

From : Department of Labor

SUBJECT : Additional Differential Compensation

The County and C.S.E.A. have agreed to pay County employees a tional differential compensation. The purpose of this memorandum is to explain the operation and effect of this agreement.

I. Rate of Pay

The rate of payment for the additional differential compensa is 15¢ for each premium hour worked, unless the employee is receiving a higher rate under any other ordinance passed by Board of Supervisors.

II. Premium Hours

The compensation of the premium hours for an employee is as follows:

a). Employee must work a full shift, at least half of which between the hours of 4:00 P.M. and 8:00 A.M.

b). If an employee works such a qualified shift, he shall re the additional differential compensation for all hours worke regardless of whether such hours are between 4:00 P.M. and 8: Note, however, that if an employee works one shift more tha of which is outside the period between 4:00 P.M. and 8:00 A.M and then works another shift which is within such period, the employee receives such additional differential compensation f only the shift worked during the premium hours.

Examples:

1. Employee works a shift from 8:00 A.M. to 4:00 P.M. and works from 4:00 P.M. to 8:00 P.M. This employee receives no additional differential compensation.

2. An employee works from midnight to 8:00 A.M. and then fro 8:00 A.M. to 12 P.M. This employee receives 12 hours of addi differential compensation.

III.

IV.

V.

BWM:ffl

3. An employee works a shift of 8:00 A.M. to 4:00 P.M. and then works an additional shift from 4:00 P.M. to midnight. This employee receives additional differential compensation for only the second shift, from 4:00 P.M. to 12:00 P.M.

4. An employee works a shift from 11:00 A.M. to 7:00 P.M. and then works from 7:00 P.M. to 9:00 P.M. This employee would receive no additional differential compensation.

Amount of Premium Hours

The additional differential compensation is only paid for hours actually worked during premium time. Therefore, if an employee goes off duty for meal time then he receives no additional differential compensation for the time spent during meal time. If, however, an employee is on duty, but not working, i.e., is subject to call and cannot leave the premises during meal time, then he receives additional differential compensation for such time.

Authorized Leave

If an employee is on authorized leave with full pay, such as personal leave, sick leave, vacation time, or paid holiday, the employee will qualify for payment of additional differential compensation if he would have been scheduled to work a shift during the qualifying premium hours but for such authorized leave.

Example:

An employee is scheduled to work a shift from midnight to 8:00 A.M. but does not work that shift because he is sick. The employee would receive additional differential compensation for the hours he would have worked but for sickness.

Procedure for Payment

Appropriate forms for the payment of additional differential compensation are now available from the Comptroller's Office.

Robert W. MacGregor
Commissioner

Exhibit "A"

EXHIBIT B TO PETITION

(Letterhead of)

NEW YORK STATE POLICEMEN'S AND
FIREMEN'S RETIREMENT SYSTEM

May 18, 1971

Commissioner Louis J. Frank
Nassau County Police Department
1490 Franklin Avenue
Mineola, New York 11501

In re: Nassau County
Code: 1.0028

Dear Mr. Frank:

This will reply to your letter dated May 3, 1971, addressed to Mr. Meek, and requesting information regarding the computation of final average salary based upon three consecutive years of member service. Such a final average salary contemplates the use of the member's highest average compensation earned during any three consecutive years of member service. In arriving at the highest average annual compensation for three consecutive years, the Retirement System recognizes salary, wages, maintenance, or any allowance in lieu thereof, plus payments to a member of the monetary value of

a. accumulated and unused vacation time that accrued during such three year period,

b. termination payments based upon the ratio which the said three year period bears to the total years of service, and

c. time allowances granted in lieu of overtime compensation otherwise payable during such three year period.

Exhibit "A"

Exhibit B to Petition

This method of computation is based upon the definition of final average salary and annual compensation, in section 302 of the Retirement and Social Security Law, and accords with the three year averaging principle under present law.

Yours very truly,

JSM RR

John S. Mauhs
John S. Mauhs
Counsel

EXHIBIT C TO PETITION

Testimony with Exhibits

(Omitted pursuant to Stipulation)

Exhibit "A"

EXHIBIT D TO PETITION

Decision

NEW YORK STATE POLICEMEN'S AND FIREMEN'S RETIREMENT SYSTEM

In the Matter of the Application of

EDWARD LECCI

Reg. No. A 09147

pursuant to section 374 of the Retirement and Social Security Law for a hearing and redetermination of his application for a recomputation of his service retirement allowance under section 385-a of the Retirement and Social Security Law.

The applicant herein retired as a patrolman from the Nassau County police force as of January, 1971. He filed an application for retirement benefits based on his average salary for the last three years plus the lump sum payments received by him pursuant to a contract between the County of Nassau and the Nassau County Patrolman's Benevolent Association. The latter provided for lump sum payments to be made at retirement at the rate of three days compensation for each year of service (63 days) and one-half day for each day of accumulated sick leave (150 days)).

The Retirement System has allowed the inclusion in the computation of final average salary the amount of lump sum terminal leave payments which accrued during the last three years of service (9 days), but no amount was included for payments on account of sick leave.

Section 302 (9)(b) of the Retirement and Social Security Law reads as follows:

"b. In the case of a member having credit for three years or more of member service, such term shall mean his highest average annual compensation earned during any three consecutive years of member service for which he is credited, provided that a member by written request, filed with the comptroller prior to the effective date of retirement and in form satisfactory to the comptroller, may select any other period of three consecutive years of member service for which he is credited."

The above definition of final average salary does not contemplate any compensation in excess of that earned during three consecutive years of member service. Lump sum payments computed at a rate in excess of three days pay for each of the said three consecutive years are not within the purview of the law.

Allowances for unused sick leave are covered by section 341 (j) (1) of the Retirement and Social Security Law, which reads as follows:

"1. In addition to any other service credit to which he is entitled, a member...shall be granted...accumulated unused sick leave...but such credit shall not... (c) be considered in computing final average salary."

Unused sick leave may be used to increase service credit but may not be considered in computing final average salary in determining retirement allowances.

The agreement between the Association and the County of Nassau provides for certain lump sum payments to be made to a member of the county police upon retirement. It cannot and does not mandate the use of such monies in the determination of final average salary.

Exhibit "A"

Exhibit D—Decision

The action by the Retirement System in excluding lump sum payments for unused sick leave is mandated by the provisions of the statute. The exclusion of the lump sum service payments beyond the three year period is also a part of the statutory design.

The application is denied.

Dated: New York, New York
September 8, 1971

SIMON SILVER,
Hearing Officer.

Exhibit "A"

EXHIBIT E TO PETITION

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in the Matter of the Application of

EDWARD LECCI

Reg. No. A 09147

pursuant to section 374 of the Retirement and Social Security Law for a hearing and redetermination of his application for a recomputation of his service retirement allowance under section 385-a of the Retirement and Social Security Law.

A hearing having been held in the above entitled matter on August 13, 1971, in the State Office Building, 270 Broadway, New York, New York, with the Hon. Simon Silver presiding as Hearing Officer, and the applicant, Edward Lecci, having appeared in person and by Richard Hartman, Esq., his attorney, and the New York State Policemens and Firemens Retirement System having appeared by John S. Manbs, Esq., its Counsel, and the proofs having been heard and all the evidence taken and introduced at the hearings having been read and considered,

Now, after due deliberation, the State Comptroller finds and decides as follows:

FINDINGS OF FACT

1. The applicant, Edward Lecci, filed a service retirement application on November 3, 1970, electing to retire under the provisions of section 385-a of the Retirement and Social Security Law on January 3, 1971.

Exhibit E to Petition

2. Thereafter, the Retirement System was advised by the applicants employer, Nassau County, that upon the termination of services, the following lump sum payments were made: 150 days pay on account of accumulated sick leave, and 63 days pay on account of terminal leave.

3. In computing the applicants final average salary pursuant to section 302 (9)(b) of the Retirement and Social Security Law, the Retirement System gave no credit for the lump sum payment on account of sick leave, and limited the credit on account of the lump sum payment for terminal leave to a total of nine days pay.

4. The applicant contends that, in the calculation of his final average salary, he should have been given credit for the full amount of the lump sum payments made to him on account of accrued sick leave and terminal leave.

CONCLUSIONS OF LAW

1. The definition of the term "final average salary" in the Retirement and Social Security Law does not contemplate any compensation in excess of that earned during any three consecutive years of member service. Accordingly, a lump sum terminal leave payment computed at a rate in excess of three days pay for each of the three said years, is not within the purview of the law. For this reason, the Retirement System could not consider more than nine days terminal pay in the computation of the applicant's final average salary.

2. Allowances for unused sick leave are authorized by sections 41 (j) and 341 (j) of the Retirement and Social Security Law, which provide, in part, that credits for accumulated sick leave shall not be considered in the computa-

tion of final average salary. Thus, the action by the Retirement System is excluding lump sum payments for unused sick leave is mandated by the provisions of this statute.

On the basis of the foregoing Findings of Fact and Conclusions of Law,

IT IS HEREBY DETERMINED AND DIRECTED that the application of Edward Lecci for a recomputation of his service retirement, pursuant to section 385-a of the Retirement and Social Security Law, be and the same is hereby denied.

Dated at New York, New York, this 17 day of September, 1971

Arthur Levitt
State Comptroller
By
Simon Silver
Simon Silver
Hearing Officer

EXHIBIT F

k. Termination Pay.

Upon separation from service, after twenty (20) years, for any reason, other than cause, or upon the death in service of any employee, such employee or his legal representative, shall be entitled to cash payment for accumulated terminal leave computed on an entitlement basis of three (3) days for each year of completed service. Year of completed service shall only include time served as a member of the Police Force of the County on a full pay status or while on a Military Leave of Absence pursuant to Section 243 of the Military Law of New York State.

Exhibit B

Notice of Motion

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF ALBANY

(Same Title)

SIR:

PLEASE TAKE NOTICE, that upon the annexed affidavit of John S. Mauhs, sworn to the 4th day of November, 1971, and upon the petition herein, respondent will move pursuant to Civil Practice Law and Rules, §7804 (f), at a Special Term of this Court, Part I thereof, to be held at the County Courthouse, City of Albany, New York, on the 12th day of November, 1971, at 9:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order dismissing the petition upon objections in point of law, and for such other and further relief as to the Court may seem just and proper.

Dated: Albany, New York
November 4, 1971

Yours, etc.,

LOUIS J. LEFKOWITZ
Attorney General of the State
of New York
Attorney for Respondent
The Capitol
Albany, New York 12224

To:

RICHARD HARTMAN, ESQ.
Attorney for Petitioner
300 Old Country Road
Mineola, New York 11501

Exhibit "B"

Affidavit of John S. Mauhs in Support of Petition

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF ALBANY

State of New York
County of Albany ss.:

JOHN S. MAUHS, being duly sworn, deposes and says:

1. I am an attorney duly admitted to practice in the State of New York and for the past 4 years I have been employed as Counsel to the New York State Employees Retirement System and the New York State Policemen's and Firemen's Retirement System.

2. I am fully familiar with the facts and circumstances which give rise to this proceeding, and make this affidavit in support of respondent's motion to dismiss the petition.

3. As appears by the petition, Edward Lecci was employed as a policeman by the Nassau County Police Department for approximately 21 years prior to his retirement on January 2, 1971, and was a member of the New York State Policemen's and Firemen's Retirement System. Upon information and belief, and as petitioner alleges, he was never in the employ of the State of New York.

4. Upon the filing of petitioner's application for retirement, the Retirement System computed his retirement benefits based upon his final average salary (as defined in §302[9][b] of the Retirement and Social Security Law), his length of creditable service and the provisions of §385-a of the Law.

5. Thereafter, pursuant to the provisions of §374(d) of the Law, petitioner made due and timely demand for a

hearing and redetermination of his benefits. A hearing was held on August 13, 1971, before Hon. Simon Silver, the designated hearing officer. Petitioner asserted at that time, as he does in the petition herein, that his final average salary was improperly computed; that by virtue of a collective bargaining agreement (Exhibit A) between the County of Nassau and the Patrolmen's Benevolent Association of the Police Department of the County of Nassau (PBA) effective retroactively to January 1, 1971, patrolmen were granted termination pay upon separation after 20 years' service, death or retirement, of a cash payment equivalent to three (3) days' pay for each year of completed service and, in addition, the cash value of accrued and unused sick leave, to the extent of 50% thereof, up to a maximum of 165 working days; and that petitioner was entitled to have the full amount of his termination pay, computed as above, included in his final year's earnings for the purpose of computing "final average salary".

6. The position of the Retirement System at the hearing, as in this proceeding, is summarized in deponent's letter to Commissioner Louis J. Frank of the Nassau County Police Department, dated May 18, 1971, and set forth as Exhibit "B" of the petition, to wit: that for the purpose of computing final average salary, the Retirement System recognizes, in addition to salary paid during any three consecutive years of member service, payment of the cash value of:

(a) accumulated and unused vacation time accruing during those three years,

(b) termination pay based on the ratio which the said three-year period bears to the total years of service,

(c) compensatory time off allowed in lieu of overtime

compensation otherwise payable during the same three years.

Accordingly, in computing the final average salary of petitioner, the Retirement System did not include (1) the cash value of unused sick leave or (2) terminal leave payments in excess of nine days.

7. Upon the findings and conclusions of the hearing officer, supporting the method of computation of the Retirement System, the Comptroller denied a redetermination (Exhibits D and E).

8. The Comptroller was not a party to the contract between the County of Nassau and its Police Department PBA and is not bound by its terms; while the provisions of paragraph 7-m of the contract may bind the County in the payment of termination pay, including the cash value of unused sick leave, upon separation or retirement of an employee, they are not binding upon the Comptroller in the computation of retirement benefits.

9. In order to succeed in this proceeding, which is in the nature of a writ of mandamus, petitioner must show a clear legal right to the relief requested, and that the action of the respondent in denying recomputation in accordance with the petitioner's demand was arbitrary, capricious and clearly illegal (*Matter of Small* v. *Moss*, 277 N.Y. 501 [1938]). Deponent submits that the respondent's determination was based upon his (the Comptroller's) construction of a broad statutory term (final average salary) regularly employed in a statute which he is charged with administering, and that such construction must be upheld unless it can be shown to have no reasonable basis in law (*Matter of Colgate-Palmolive-Peet Co.* v. *Joseph*, 308 N.Y. 333

[1955]; *Matter of Red Hook Cold Storage Co.* v. *Dept. of Labor*, 295 N.Y. 1 [1945]; *Matter of Mounting and Finishing Co.* v. *McGoldrick*, 294 N.Y. 104 [1945]; *Matter of Marsh (Catherwood)*, 13 N.Y. 2d 235 [1963]).

10. The statutory definition of "final average salary" relied on here by respondent (Retirement and Social Security Law, §302[9][b]) read with the definition of "annual compensation" (§ 302[2]) contains neither a specific reference to termination pay or a suggestion that termination pay must be included therein; accordingly, the Comptroller has concluded that termination pay is not "annually earnable" and is not annual compensation as that term is used in §302[9][b].

11. The only statutory provision with regard to unused sick leave is found in Retirement and Social Security Law, §341[j], which authorizes the conversion of unused sick leave credits into additional service credits (i.e., extending a member's length of service by the application of unused sick leave) and provides specifically that such credits shall not be considered in computing final average salary. The provisions of §341[j] are available to State employees only, and petitioner admits that he is not a State employee.

12. Because the inclusion of termination pay in the computation of final average salary is not specifically authorized by statute, it cannot be termed a retirement benefit, the impairment of which would be prohibited by Article V, § 7 of the New York State Constitution; in fact, a number of "benefits" have been extended to members by legislation on a temporary or year-to-year basis, which require yearly re-enactment, and have never been regarded as protected benefits. Neither does the fact that the Comptroller may, in areas of permissible discretion, liberalize

the basis on which benefits are computed from one year to another confer on the resulting increased benefits a constitutionally protected status. Deponent submits that only those benefits enacted by the Legislature on a permanent basis are protected by Article V, §7 of the State Constitution.

13. Deponent submits further that nothing in the Taylor Law (Civil Service Law, Art. 14), authorizing collective negotiations between public employers and representatives of public employees, can be extended to permit a participating employer in the Retirement System to negotiate an increase in retirement benefits. Retirement benefits for public employees in the State of New York are clearly a matter of State concern. Accordingly, municipalities have no authority to vary the provisions of the Retirement and Social Security Law by local action (see *Matter of Pettit v. McCabe*, 60 Misc 2d 177 [Special Term, Broome Co., 1969]). The fiscal solvency of the System cannot be maintained if every participating employer is free to negotiate with the System's reserves. Such agreements, if negotiated, are certainly not binding on the Retirement System.

The decision in *Matter of Board of Education, etc. v. Associated Teachers of Huntington*, 62 Misc 2d 906, mod 36 A.D. 2d 753 (2nd Dept., 1971) is not to the contrary. There, it was held that a term in a collectively negotiated contract providing for a salary increase of ½ of 1% for each year of prior service to every teacher in his final year before retirement (upon notice duly given at least one year in advance) was not beyond the authority of the school board to grant. The Court approved the provision as payment for services rendered, not a gift and not a subterfuge to increase pensions. Significantly, the Court noted further

that the provision did not constitute termination pay, and that under Education Law §501[11], relating to teachers' retirement, "final average salary" does not include any form of termination pay.

14. Deponent respectfully prays, therefore, that respondent's motion to dismiss the petition herein upon the foregoing objections in point of law be granted and that the petition be dismissed.

John S. Mauhs

(Sworn to on November 4, 1971)

C-1

Exhibit C

Order Denying Motion to Dismiss Petition

At a Special Term of the Supreme Court of the State of New York held in and for the county of Albany, in the County Courthouse, Albany, New York on the 12th day of November, 1971.

Present:

HON. JOHN H. PENNOCK

Justice.

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF ALBANY

The petitioner, Edward Lecci, by his attorney, Richard Hartman, Esq., having duly moved by a show cause order, pursuant to Article 78 of the Civil Practice Law and Rules of the State of New York for a Judgment directing the Respondent to compute his retirement benefits based upon his final average salary as defined in Section 302 (9) (a) of the Retirement and Social Security Law inclusive of all lump sum payments paid by the County of Nassau to the Petitioner in the form of termination pay and pay for unused sick leave, his length of creditable service and the provisions of Section 385-a of the Law, and said motion having regularly come on to be heard,

Now, upon reading and filing the Order to Show Cause dated October 4, 1971; the petition of Petitioner, Edward Lecci, in support of the Order to Show Cause, sworn to on the 3rd day of October, 1971; the 1971-72 employment contract between the Nassau County PBA and the County of Nassau as well as paragraph 7(k) of the 1970 employment contract; a letter dated May 18, 1971, addressed to Commissioner Louis J. Frank for the Nassau County

Exhibit "C"

Order Denying Motion to Dismiss Petition

Police Department from John S. Mauhs, Counsel for the New York State Policemen's and Firemen's Retirement System; the decision "Findings of Fact" and "Conclusions of Law" rendered by the Hon. Simon Silver who presided as Hearing Officer at a hearing held on August 13, 1971 as a result of Petitioner's application, all of which were in support of the Order to Show Cause brought by Petitioner, and the affidavit of John S. Mauhs, Counsel to the New York State Policemen's and Firemen's Retirement System, in opposition thereto, sworn to on the 4th day of November, 1971; and after hearing Richard Hartman, Esq., Counsel for the Petitioner in support of said Order to Show Cause, and John Q. Driscoll, Esq., Assistant Attorney General for the State of New York, for the Respondent, in opposition thereto, and after due deliberation having been held thereon, and a memorandum decision having been issued, it is hereby

ORDERED, that Respondent's motion pursuant to CPLR (7804(f) to dismiss the Petitioner's petition is denied, and it is further

ORDERED that within five (5) days following the service of a conformed copy of this order, with date of entry thereon, upon him, the Respondent shall serve upon the Petitioner a copy of his answer to the petition.

ENTER:

Dated: Albany, New York
February 14, 1972.

s/ JOHN H. PENNOCK
J.S.C.

Exhibit D

Answer

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

The respondent, in answer to the petition herein, by his attorney, Louis J. Lefkowitz, Attorney General of the State of New York:

FIRST: Admits the allegations of the petition set forth and contained in the paragraphs thereof numbered "1" through "5", inclusive, "7", "11", "14", "16" through "21", inclusive and "31".

SECOND: Denies knowledge or information sufficient to form a belief as to the allegations contained in the paragraphs numbered "6" and "32".

THIRD: Denies each and every allegation set forth and contained in the paragraphs of the petition numbered "8", "10", "12", "15", "22", "24", "25", "26", "27", "28", "29" and "30".

FOURTH: Admits the allegations of paragraph "9", except denies that the petitioner is entitled to all the benefits contained within the 1971 contract (Ex. A).

FIFTH: Admits the allegations of paragraph "13", except denies that petitioner upon retiring was entitled to be paid for unused sick leave.

SIXTH: Denies the allegations contained in paragraph "23" and any implications contained therein, except admits that by the various contract terms set forth in the petition, petitioner's claim to termination pay and sick leave are contingent upon his retirement in good standing.

Exhibit "D"

Answer

AS AND FOR A FIRST PARTIAL AFFIRMATIVE DEFENSE AND OBJECTION IN POINT OF LAW, RESPONDENT ALLEGES:

SEVENTH: That as appears by para- " of the petition the contract between the Coun , au and the Nassau County Patrolmen's Benevolent ssociation was executed by the County Executive and became binding upon the parties thereto on March 8, 1971.

EIGHTH: That as further appears by the petition, paragraph "9", the petitioner retired effective January 2, 1971, more than two months before the execution of the contract aforesaid.

NINTH: That although the said contract was, by its terms, effective retroactively to January 1, 1971, that fact can create no new termination benefits for petitioner, who performed no active service in consideration of such prospective benefits.

TENTH: That the contract in effect between the County and the Patrolmen's Benevolent Association immediately prior to January 1, 1971, made no provision for payment of any part of the cash value of unused sick leave.

ELEVENTH: That, accordingly, the payment of the cash value of unused sick leave to petitioner and others similarly situated by the County of Nassau was without legal foundation and constitutes an illegal gift of public money.

AS AND FOR A SECOND PARTIAL AFFIRMATIVE DEFENSE AND OBJECTION IN POINT OF LAW, RESPONDENT ALLEGES:

TWELFTH: That in order to avoid respondent's contention that the inclusion of termination pay in the computation of "final average salary" is limited to that

amount accrued in the three years which comprise the salary base, petitioner contends that termination pay is not accrued but earned at the moment of retirement.

THIRTEENTH: That in order to avoid the claim made by the respondent in *Lecci* v. *Nickerson* (63 Misc. 2d 756) that the payment of termination pay was without consideration and constituted an illegal gift, this same petitioner claimed that such payments were compensation accrued and deferred until the time of retirement.

FOURTEENTH: That by virtue of the assertion made by him in litigation against the County of Nassau, for the purpose of establishing the legality of termination pay, petitioner is estopped from now asserting that termination pay is earned in a lump sum at the time of retirement.

AS AND FOR A THIRD PARTIAL AFFIRMATIVE DEFENSE AND OBJECTION IN POINT OF LAW, RESPONDENT ALLEGES:

FIFTEENTH: That the payment of termination pay by the County, pursuant to the agreement executed by and between the County of Nassau and the Police Benevolent Association on March 16, 1970, to persons who retired during the year 1970, was without consideration, and was an unconstitutional gift of public funds.

SIXTEENTH: That accordingly, inclusion of amounts so paid in the computation of members' final average salary by the Retirement System during 1970 was without legal authority, and accordingly, respondent has undertaken to recalculate the allowances as paid.

AS AND FOR A FOURTH PARTIAL AFFIRMATIVE DEFENSE AND OBJECTION IN POINT OF LAW, RESPONDENT ALLEGES:

SEVENTEENTH: That notwithstanding the obligation of the County of Nassau to pay to its policemen upon retire-

ment the cash value of unused sick leave, the respondent has consistently refused to recognize such payments as establishing a retirement benefit.

EIGHTEENTH: That the known and consistent position of the respondent for a period of years in refusing to recognize payment of the cash value of unused sick leave as a retirement benefit precludes the interpretation claimed by the petitioner.

AS AND FOR A FIFTH PARTIAL AFFIRMATIVE DEFENSE AND OBJECTION IN POINT OF LAW, RESPONDENT ALLEGES:

NINETEENTH: That section 341, subd. j of the Retirement and Social Security Law authorizes the use of accrued and unused sick leave to extend a member's service credit for purposes of retirement; it provides expressly, however, that such leave credits shall not be considered in the computation of final average salary; petitioner asserts that section 341 is applicable to State employees only and that he is not a State employee.

TWENTIETH: That Retirement and Social Security Law, §333 (added L. 1970, c. 467) authorizes participating employers, such as Nassau County, to provide for their own employees certain benefits previously available only to State employees, including subdivision j of section 341.

TWENTY-FIRST: That although the County of Nassau has not elected to adopt the provisions of section 341, subdivision j for its employees, it has attempted to provide for the use of sick leave credits, by contract, in a manner not authorized by statute.

TWENTY-SECOND: That the provisions of Retirement and Social Security Law, §333, limit the manner in which

the County of Nassau may authorize the use of sick leave credits.

WHEREFORE, respondent respectfully prays for a judgment dismissing the petition, and such other and further relief as to the Court may seem just and proper.

Dated: Albany, New York
March , 1972.

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondent
The Capitol
Albany, New York 12224

(Verified on March 29, 1972.)

Exhibit E

Order to Show Cause

At a Special Term of the Supreme Court of the State of New York held in and for the County of Albany, in the County Courthouse, Albany, New York on the 10th day of April, 1972.

Present:

Hon. Edward S. Conway
Justice

SUPREME COURT OF THE STATE OF NEW YORK

County of Albany

(Same Title)

Upon the annexed Petition of Edward Lecci, duly sworn to the 9 day of April, 1972, and upon all of the proceedings heretofore had herein, and upon motion of Richard Hartman, attorney for the Petitioner, it is

Ordered, that the Respondent or his attorney show cause before this Court at a Special Term, Part I thereof, to be held at the County Courthouse, City of Albany, New York, on the 14th day of April, 1972, at 9:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard why an order should not be made and entered herein striking out the Respondent's answer and directing the entry of summary judgment in favor of the Petitioner and against the Respondent for the relief demanded in the petition, upon the ground that there are no triable issues of fact and that there is no defense to the cause of action alleged in the petition and for such other and further relief as may be just, proper, and equitable.

Exhibit "E"

Order to Show Cause

ORDERED, that service of a copy of this Order to Show Cause and Petition upon which it is based, upon Respondent on or before the 12th day of April, 1972, be deemed good and sufficient service upon Respondent.

Dated: Albany, New York
4-10-1972

(s) EDWARD S. CONWAY
Justice of The Supreme Court

Exhibit "E"

Affidavit of Edward Lecci in Support of Motion

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF ALBANY

(Same Title)

State of New York
County of Nassau ss.:

EDWARD LECCI, being duly sworn, deposes and says:

1. I am the petitioner in the above entitled action.

2. The above entitled action was brought via an Order To Show Cause seeking to have an Order made and entered directing the respondent to comply with the definition of "final average salary" under Section 302, subdivision (9) (b) of the Retirement and Social Security Law of the State of New York and to forthwith recalculate petitioner's retirement allowance so as to include therein all lump sum payments paid by the County of Nassau to the petitioner in the form of termination pay and pay for unused sick leave.

3. The above entitled action was commenced by the service upon the respondent on or before the 7th day of October, 1971, of an Order To Show Cause made returnable on the 8th day of October, 1971 along with a supporting Petition, copies of which are annexed hereto as Exhibit "A".

4. On the 4th day of November, 1972, the defendant duly appeared in the above entitled action by Louis J. Lefkowitz, his attorney, who served a Notice of Motion with supporting Affidavit, seeking an Order dismissing petitioner's Petition upon Objections in Point of Law. (copies of which are annexed as Exhibit B)

Exhibit "E"

Affidavit of Edward Lecci in Support of Motion

5. That said Motion to Dismiss based upon Objections in Point of Law was brought on and heard by the Honorable John H. Pennock who denied said Motion in an Order dated February 14, 1972, a copy of which is annexed hereto as Exhibit "C".

6. On the 29th day of March, 1972, the defendant interposed an Answer, a copy of which is annexed hereto as Exhibit "D". Said Answer contained certain admissions as well as denials with respect to the allegations set forth in the above referred Petition and additionally set forth specific Affirmative Defenses and Objections in Points of Law.

7. I believe that there is no defense to the cause of action set forth in my Petition.

8. The facts and circumstances upon which the cause of action arose are as follows:

a. Petitioner, Edward Lecci, at all times hereinafter mentioned, was a member of the Police Department of the County of Nassau having been appointed to said position on the 16th day of May, 1949, and retired on the 2nd day of January, 1971.

b. That at all the times hereinafter mentioned, petitioner was never in the employ of the State of New York.

c. That at all the times hereinafter mentioned, petitioner, by virtue of the fact that he was a police officer employed by the Nassau County Police Department, a participating employer in the New York State Policemen's, and Firemen's Retirement System, was a member of said retirement system and entitled to all of the benefits thereunder.

Exhibit "E"

Affidavit of Edward Lecci in Support of Motion

d. That at all times hereinafter mentioned, Respondent, Arthur Levitt, is the duly elected Comptroller of the State of New York and the person responsible by law for the Administration of the New York State Policemen's and Firemen's Retirement System.

e. That on the 8th day of March, 1971, a contract between the Nassau County Patrolmen's Benevolent Association and the County of Nassau was duly signed by County Executive Ralph G. Caso on behalf of the County of Nassau after having been approved by the Nassau County Board of Supervisors. (a copy of said contract is attached as Exhibit "A" to Petitioner's original petition)

f. That the Nassau County Patrolmen's Benevolent Association is the certified bargaining agent for all members of the Nassau County Police Department from the rank of Patrolman to Detective Captain.

g. That said contract was made pursuant to the Taylor Law after several months of collective bargaining and was made retroactive so as to have a binding effect upon all members of the bargaining unit who were employed by the Nassau County Police Department on or after January 1, 1971.

h. That the contract benefits resulting from said collective bargaining under the Taylor Law were legal and binding and any attempt by the Respondent to impair said contract benefits via administrative ruling is prohibited by Article V, Section 7 of the New York State Constitution and Article 1, Section 10 of the United States Constitution.

i. That Petitioner was a patrolman in good standing in the Nassau County Police Department until the date of

his retirement on January 2, 1971 and entitled to all the benefits contained within the contract then in effect.

j. That pursuant to Paragraph 7 m of the 1971 Agreement, Petitioner was entitled upon retirement to termination pay equivalent to three (3) days pay a year for all years served with the Nassau County Police Department prior to his retirement.

k. That Petitioner served 21½ years with the Nassau County Police Department and was therefore paid by the County of Nassau, a lump sum cash termination payment calculated by multiplying the number of years served by three days a year.

l. That also pursuant to Paragraph 7 m of the 1971 Agreement Petitioner was entitled upon retirement to a maximum of one hundred sixty-five (165) days pay for unused sick leave.

m. That Petitioner upon retiring was entitled to and paid by the County of Nassau for unused sick leave, an amount equal to one hundred fifty (150) days pay.

n. That Section 302 Subdivision 9 (b) of the New York State Retirement and Social Security Law defines the "final average salary" as:

> "In the case of a member having credit for three years or more of member service, such term shall mean his highest average annual compensation earned during any three consecutive years of member service for which he is credited, provided that a member by written request filed with the comptroller prior to the effective date of retirement and in form satisfactory to the comptroller, may select any other period of

three consecutive years of member service for which he is credited."

o. That Petitioner earned and was paid termination pay and sick pay in his final three years and such lump sum payments are includable in the amount from which the final average salary is computed.

p. That Petitioner was notified and his retirement allowance reflects in the checks that he has received that his final average salary is being computed by including only 3/21st of the termination pay and none of the sick pay paid to him by the County of Nassau upon retirement. (a copy of an informal opinion of the counsel to the retirement system explaining their position is attached as Exhibit "B" to Petitioner's original petition)

q. That upon realizing that the computation of his retirement allowance excluded the amounts paid for termination pay and for unused sick leave, Petitioner made application pursuant to Section 374 of the Retirement and Social Security Law for a hearing for redetermination of his application for a re-computation under Section 385 (a) of the Retirement and Social Security Law of his service retirement allowance so as to have his "final average salary" under the "three year" retirement bill, upon which said retirement allowance is based, reflect the inclusion therein of first, the full amount paid to Petitioner upon retirement for termination pay, and second, to additionally reflect the inclusion therein of the full amount paid to Petitioner upon retirement for unused sick leave.

r. A hearing was held on August 13, 1971 as a result of Petitioner's said application. The Hon. Simon Silver presided as Hearing Officer. (copy of the testimony

with exhibits presented at the hearing is attached as Appendix C to Petitioner's original petition.)

s. That on September 8, 1971, the Hon. Simon Silver rendered his decision denying Petitioner's application for recomputation. (copy of the decision is attached as Appendix D to Petitioner's original petition.)

t. On September 17th, 1971 the Hon. Simon Silver published his "Findings of Fact" and "Conclusions of Law" with respect to his above referenced September 8, 1971 decision. (copy of the "Findings and Conclusions" is attached as Appendix E to Petitioner's original petition.)

9. That Petitioner, having exhausted his administrative remedies, brought by an Order to Show Cause, a motion seeking an order directing that the Respondent comply with the definition of "final average salary" under Section 302, Subdivision 9 (b) of the Retirement and Social Security Law to include therein all compensation earned and paid during the computation period applicable to Petitioner and that said definition does not exclude therefrom any form of termination pay or sick pay earned and paid during said computation period.

10. In Respondent's Answer, there is alleged as a "First Partial Affirmative Defense and Objection in Point of Law" the contention that the terms of the 1971 employment contract between the County of Nassau and the Nassau County Patrolmen's Benevolent Association covering the period from January 1, 1971 to December 31, 1972, are not applicable to the Petitioner, Edward Lecci, as said contract was signed on March 8, 1971, and Petitioner retired on January 2, 1971. Respondent totally ignores the fact that upon the signing of said contract, it was made retroactive to January 1, 1971. According to Respondent's

reasoning, the retroactive provision of said contract is to be totally ignored in direct contradiction to all legal precedents in the field of contract law. Concluding therefrom, Respondent then attempts to claim that the payment for unused sick leave to Petitioner lacks consideration and is thus without legal foundation thereby constitutionally an illegal gift of public money. Such an interpretation is totally without foundation and is contrary to the recognized judicial interpretation rendered by the Courts with regards to the benefits in issue. In particular, the Supreme Court, Appellate Division, Second Department, in *Teachers Association, Central High School District No. 3* v. *Board of Education, Central High School District No. 3 Nassau County,* 312 NYS 2d 252 (1970) held that the payment for unused sick leave to a public employee upon his retirement is not a gift and does not offend the State Constitution. In discussing the contractual element of consideration with regards to the payment for unused sick leave, the Court restated the well accepted doctrine that the requirement of consideration under such circumstances was met in that payment offered for unused sick leave by the public employer, results in more competent and more efficient service from employees since said employment fringe benefit encourages the employee to stay in public service thereby acquiring an expertise as to his job and additionally deters the employee from absenteeism for trifling ailments. The fact that Petitioner retired two days after the effective date of said contract in no way alters or affects the legal obligations set forth therein.

11. In addition to the above, it should also be noted that Respondent is inconsistent in his reasoning. Whereas Respondent attempts to claim that the 1971 employment contract between the County of Nassau and the Nassau County Patrolmen's Benevolent Association is not ap-

plicable to Petitioner since the contract was signed March 8, 1971 and Respondent retired January 2, 1971, Respondent overlooks the fact that the Retirement System in computing Petitioner's retirement benefits based upon his "final average salary" acknowledged in computing said "final average salary" the increase in Petitioner's yearly salary base for the period of time applicable due to the 1971 contract provisions.

12. Respondent's Second Partial Affirmative Defense And Objection In Point Of Law sets forth that Petitioner, in prior litigation wherein the issue was whether or not the payment of termination pay constituted an illegal gift, claimed that termination payment was compensation accrued and deferred until the time of retirement and is thereby estopped from now asserting that termination pay is earned at the time of retirement. Without going into an extensive comparison of the issues, the character of the parties, the legal question and precedents involved with regards to the case at hand and *Lecci* v. *Nickerson* (63 Misc 2d 756), the case referred to by Respondent in his Second Partial Affirmative Defense And Objection In Point of Law, and a lesson in semantics, Respondent's defense and objection can be simply controverted upon the realization that entitlement to termination pay under the provisions of the employment contract in question was contingent upon Petitioner retiring in good standing and thus earned at the moment of retirement. The fact that said entitlement is compiled by an arithmetic calculation incorporating therein the number of years of service of a retiree, in no way alters the fact that entitlement to termination pay is conditional upon retiring in good standing and is not earned until the retiree does in fact retire in good standing.

Exhibit "E"

Affidavit of Edward Lecci in Support of Motion

13. Respondent's Third Partial Affirmative Defense And Objection In Point Of Law sets forth the fact that members of the Nassau County Police Department who retired during the year 1970 and who heretofore had included in their respective "final average salary calculations" the full amount of termination pay received by said retiree upon retirement and who received retirement checks reflecting the inclusion therein, are no longer receiving said allowances as said allowances were, according to Respondent, based upon the payment of termination pay that was an unconstitutional gift of public funds since it was without consideration. Before analyzing the above, it should be noted that Respondent's action as set forth in its Third Partial Affirmative Defense And Objection In Point Of Law can only be viewed as an obvious attempt by Respondent to reinforce its position in this pending action and has no legal basis. Respondent found itself in an indefensible position on the question of termination pay with regards to this action. In 1970, Respondent included in the "final average salary computation" the full amount of termination pay received by a retiree upon retirement pursuant to said 1970 contract. As to a 1971 retiree, who has for all intended purposes an identical contractual provision as to termination pay as did his 1970 counterpart, Respondent has attempted to state that the 1971 retiree is not entitled to have included in his "final average salary computation" the full amount of termination pay received by him at retirement. It should, therefore, be obvious to the Court that Respondent's Third Partial Affirmative Defense And Objection In Point Of Law has no merit nor basis in law, especially in view of the holding in *Lecci v. Nickerson*, 63 Misc. 2d 756 which held that termination pay provided under a collective bargaining agreement between the County of Nassau and the Nassau County Patrolmen's Benevolent Association was earned compen-

sation and not a constitutionally prohibited gift of public funds since the "inducement to enter and remain in public service, which pensions and other promised benefits promote, is valid consideration to the state and not within the constitutional ban."

14. Respondent's Fourth Partial Affirmative Defense And Objection In Point Of Law states that Respondent has taken the position that payment of the cash value of unused sick leave is not a retirement benefit and therefore payment of the cash value of unused sick leave is not a retirement benefit. Such simplistic reasoning fails to recognize that the Courts have to date recognized that payment of the cash value of unused sick leave upon retirement is not a gift and does not offend the New York State constitutional prohibition against the utilization of public funds as gifts. (see *Teachers Association, Central High School District No. 3* v. *Board of Education, Central High School District No. 3, Nassau County*, 312 NYS 2d 252 (1970)). Additionally, Article VII, Section 8 of the New York State Constitution gave the legislature power to increase pension benefits. Under the Taylor Law this power can be delegated to the "public employer" through its chief executive officer. (see *Lecci Etc.* v. *Nickerson Etc.*, 63 Misc. 2d 756 (1970), 313 NYS 2d 474.) Thus, the public employer, in this case, the County of Nassau, under the Taylor Law can enter into binding collective negotiations as to the terms and conditions of employment in the form of employee rights and benefits not otherwise authorized or prohibited by law and thereby can bind the State Comptroller with respect to pension benefits even though he was not physically a party to the negotiations. (see Civil Service Law of the State of New York, Section 204 (1); *Lecci Etc.*, v. *Nickerson Etc.*, 63 Misc. 2d 756 (1970) 313 NYS 2d 474.) In so doing, the public employer does not

vary the provisions of the Retirement and Social Security Law, but rather enters into contractual obligations pursuant to the Taylor Law with respect to terms and conditions of employment. (See *Board of Education Etc.* v. *Associated Teachers Etc.*, 62 Misc. 2d 906 (1970), 310 NYS 2d 929.) As previously stated in this Affidavit, a contract was negotiated between the Nassau County Patrolmen's Benevolent Association and the County of Nassau through its County Executive, Ralph G. Caso, said contract being signed on March 8, 1971, and being retroactive to January 1, 1971. That according to said contract, Petitioner, upon retirement, was entitled to be paid by the County for up to 165 days of pay for unused sick leave, and in fact, Petitioner did receive compensation equivalent to 150 days of pay. That said sick pay was earned and paid at the time of Petitioner's retirement pursuant to the terms of said contract and is thereby includable in the amount from which the final average salary is computed pursuant to Section 302 Subdivision (9) (b) of New York State Retirement and Social Security Law.

15. A combined reading of Section 302, subdivision 9 (b) and (d) of the New York State Retirement and Social Security Law reinforces the above conclusions that the term "final average salary" as set forth under Section 302, Subdivision 9 (b), includes within its definition, any lump sum payment for termination pay and unused sick leave. According to the rules of statutory construction, (McKinneys Statutes, Sections 212 and 240), since lump sum payments for sick leave, or accumulate vacation credit or any form of termination pay are specifically excluded from the term "final average salary" in the best "one year bill" (Section 302 Subdivision 9 (d) of the New York State Retirement and Social Security Law) and no such exclusions are set forth with respect to the term "final average salary"

as applicable to the "three year bill" (Section 302 Subdivision 9 (b) of said law), then statutory construction of said overall section dictates that the term "final average salary" under the "three year bill" encompasses the full amount of any lump sum payment for unused sick leave or termination pay. If the legislature had felt otherwise, it would have recited that said payments were excluded from the term "final average salary" under the "three year bill" (Section 302, Subdivision 9 (b) as it had done with respect to the "one year bill" (Section 302 Subdivision 9 (d). It should also be noted that as of April 1, 1972, the Retirement and Social Security Law was amended as follows:

> "Salary base for computing retirement benefits. In any retirement or pension plan to which the state or municipality thereof contributes, the salary base for the computation of retirement benefits shall in no event include any of the following earned or received, on or after April first, nineteen hundred seventy-two:
>
> 1. lump sum payments for deferred compensation, sick leave, accumulated vacation or other credits for time not worked.
>
> 2. Any form of termination pay
>
> 3. Any additional compensation paid in anticipation of retirement, or
>
> 4. That portion of compensation earned during any twelve months included in such salary base period which exceeds that of the preceding twelve months by more than twenty per centum.

Since the "one year bill" (Section 302, Subdivision 9 (d) already excludes from inclusion in the term "final average salary" any sums paid for termination pay or unused sick leave, said amendment must therefore be directed to altering the "three year bill" (Section 302, Subdivision 9 (b), which is silent as to any exclusions in computing the term "final average salary", be they termed termination pay or payment for unused sick leave, and thereby, by such Legislative action, Petitioner reiterates that said termination pay and pay for unused sick leave are included under the "three year bill" within the term "final average salary." It should also be noted that Respondent supported the enactment of the above cited provision.

16. Respondent's Fifth Partial Affirmative Defense And Objection In Point of Law states that Section 341, Subdivision j of the Retirement and Social Security Law does not apply to Petitioner since Petitioner is not a State employee; that Section 333 of the Retirement and Social Security Law permits employers, such as Nassau County, if said employer so elects, to provide the benefits available to State employees that are set forth in Section 341 of the Retirement and Social Security Law, and that since Nassau County has not elected to adopt the provisions of Section 341, Subdivision j, Nassau County is precluded from contracting to pay a legally recognized employment benefit, to wit, lump sum payment for unused sick leave that is includable by definition in the term "final average salary" pursuant to Section 302 (9) (b) of the New York State Retirement and Social Security Law. Obviously there is no merit to Respondent's Fifth Partial Affirmative Defense And Objection In Point Of Law. A proper reading of Section 333 of the Retirement and Social Security Law would reveal that it permits a participating employer, such as the County of Nassau, to avail itself of certain optional retirement benefits available

to state employees, and if so elected, then they are received according to the restrictions placed thereon such as indicated by Respondent's reference to Section 341 Subdivision j of the Retirement and Social Security Law, to wit, that sick leave credit shall not be considered in the computation of the term "final average salary". It cannot be overemphasized that Section 333 of the Retirement and Social Security Law does not, as stated by Respondent, restrict and limit the manner in which Nassau County may authorize the use of sick leave credits. Rather Section 333 provides a "take it" or "leave it" option to a participating employer either to accept the benefits provided for State employees according to enumerated restrictions, or to negotiate their own, free from said enumerated restrictions associated with said state benefits, which in fact the County of Nassau chose to do. By electing not to avail itself of Section 333, the County of Nassau is free of the prohibitions alleged by Respondent to be applicable to Petitioner in its Fifth Partial Affirmative Defense And Objection In Point Of Law.

17. I believe that the cause of action is established sufficiently to warrant the court as a matter of law to direct judgment in my favor.

18. No previous application for the relief herein prayed for has been made.

WHEREFORE, deponent respectfully asks for an order striking out the defendant's answer and directing the entry of summary judgment in his favor against the defendant for the relief demanded in the petition.

Dated: Mineola, New York
April 9, 1972

(s)
Edward Lecci

(Verified on April 9, 1972)

EXHIBIT A

Order to Show Cause dated October 4, 1971, and Petition dated October 3, 1971.

EXHIBIT B

Notice of Motion dated November 4, 1971.

EXHIBIT C

Order Denying Motion dated February 14, 1972.

These papers are identical to those printed herein

Exhibit F

Memorandum Decision of Mr. Justice Casey

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF ALBANY

(Same Title)

(Supreme Court Special Term, Albany County,

May 12, 1972)

(JUSTICE JOHN T. CASEY, Presiding)

Appearances:

RICHARD HARTMAN, ESQ.
Attorney for Petitioner
300 Old Country Road
Mineola, New York 11501

LOUIS J. LEFKOWITZ, ESQ.
Attorney General

JOHN Q. DRISCOLL, ESQ. of Counsel
Attorney for Respondent
The Capitol
Albany, New York

MEMORANDUM

CASEY, *J.*

This is an Article 78 proceeding in the nature of mandamus. Petitioner seeks a judgment directing the respondent to recalculate his "final average salary" under Subdivision 302 (9) (b) of the Retirement and Social Security Law.

Petitioner was a member in good standing of the Nassau County Police Department for approximately 21

years until his retirement on January 2, 1971. On March 8, 1971 a collective bargaining agreement was signed between the Nassau County Patrolmen's Benevolent Association and Nassau County wherein the terms and conditions of employment of members of the Nassau County Police Department were set forth. The agreement was made retroactive to January 1, 1971.

Under sub-paragraph 7 (m) of that agreement employees who had satisfied certain conditions were entitled to a lump sum cash termination payment computed on an entitlement basis of three days for each year of completed service. In addition, employees who were entitled to a cash payment for accumulated terminal leave were entitled to a lump sum cash payment for accumulated and unused sick leave to the extent of fifty percent thereof, but not to exceed one hundred sixty five working days.

When petitioner retired he was paid termination pay and for 150 unused sick leave. Some time thereafter the petitioner was notified that for purposes of computing his "final average salary". A hearing was held and the hearing officer denied petitioner's application for a redetermination. Petitioner then instituted the present proceeding; the respondent, in lieu of an answer, raised objections in point of law and sought to dismiss the petition under CPLR 7804 (f). Special Term denied the respondent's motion and directed him to interpose an answer.

Respondent's answer contains several affirmative defenses. In the first affirmative defense the respondent alleges that petitioner cannot obtain any benefits under the 1971 collective bargaining agreement because he retired prior to its execution. In another affirmative defense, respondent claims that the payment inclusion of termination

pay in the computation of "final average salary" amounts to an unconstitutional gift of public funds. The respondent further argues that payment for accrued sick leave cannot be used in the computation of "final average salary".

Termination payments represent compensation for services actually rendered and are properly includable in the computation of a petitioner's "final average salary". *Lecci v. Nickerson*, 63 Misc. 2d 756; c.f., *Board of Educ. v. Associated Teachers of Huntington*, 36 App. Div. 2d 753. This does not mean, however, that the petitioner should be credited with the full amount of the cash payments received for termination payments. "Final average salary" under Subdivision 302 (9) (b) of the Retirement and Social Security Law is defined as:

> In the case of a member having credit for three years or more of member service, such term [final average salary] shall mean the highest average *annual compensation earned* during any three consecutive years of member service for which he is credited.... (emphasis added)

Annual compensation is defined in subdivision (2) of that section as follows:

> a) The salary or wages annually earnable by a member...or any allowance in lieu thereof received by the member.

The petitioner is entitled to have the amount of money received for payment of the termination credits actually earned in the years which are to be used as the base for the computation of his "final average salary".

Exhibit "F"

Memorandum Decision of Mr. Justice Casey

The termination pay was earned at a rate of three days per year of service. The payment of the amount so earned, however, was deferred or withheld until petitioner had satisfied the other requirements of sub-paragraph 7 (k) of the collective bargaining agreement. C.f., *Local 456 International Brotherhood of Teamsters* v. *Cortlandt*, 68 Misc. 2d 645. This being so, the respondent is correct in his contention that the amount of termination pay properly included in computing the final average salary is the amount actually earned by the petitioner each of the three years from which the "final average salary" is determined. Petitioner is entitled, therefore, to three days termination pay in each year of the three year period for a total of nine days termination pay.

Cash payments for unused sick leave represent payments for services actually rendered. C.f., *Kranker* v. *Levitt*, 30 N.Y. 2d 574; *Local 456 International Brotherhood of Teamsters* v. *Cortlandt*, supra. Apparently, however there is a legislative policy excluding such payments from the computation of petitioner's "final average salary". Section 341 of the Retirement and Social Security Law governs the allowance for service for members of the policemen's and firemen's retirement system.

Subdivision 341 (j) provides:

j. Allowance for unused sick leave for members in the employ of the state.

1. In addition to any other service credit to which he is entitled, a member who meets the requirements set forth in paragraphs two and three of this subdivision shall be granted one day of additional service credit for each day of accumulated unused

> sick leave which he has at time of retirement for service, but such credit shall not (a) exceed one hundred sixty-five days, (b) be considered in meeting any service or age requirements prescribed in this chapter, and (c) be considered in computing final average salary.

The allowance for unused sick leave is limited to the policemen and firemen employed by the State of New York. Title 5 of the Retirement and Social Security Law concerns the participation in the policemen's and firemen's retirement system by certain political subdivisions and other organizations. Section 333 (which is part of Title 5) provides:

> By the adoption, filing and approval, where required, of a resolution in the manner provided by section three hundred thirty or section three hundred thirty-one of this article, a participating employer may elect to provide for its own employees any of the benefits provided for persons in the employ of the state listed in subdivision a or subdivision b, or both of them as follows:
>
> a. subdivision j of section three hundred forty-one.

The legislative scheme seems to be that a policeman or fireman employed by an organization or political subdivision other than the State of New York may receive benefits coextensive with that of an employee of the State only if his employer makes an election under Section 333. Conversely, absent such an election such an employee's benefits would be less than those of the state employees. There was no election by Nassau County pursuant to Section 333. Even if there were, the payment for unused sick leave could not be used in computing the final average salary

Exhibit "F"

Memorandum Decision of Mr. Justice Casey

because it is specifically excluded therefrom by Subdivision 341 (j) (l) (c). It is difficult to see how Nassau County by not making an election under Section 333 could obtain greater benefits for its members than it would have had it made such an election.

The respondent argues that petitioner should not get the benefits of a contract executed after his retirement. The agreement was made retroactive from January 1, 1971. At that time petitioner was a member of the police force and thus received all of the benefits thereunder and was, therefore, entitled to the benefits conferred by the contract. *Matthews* v. *Jeremiah Burns, Inc.*, 205 Misc. 1006. To hold otherwise would require the benefits received by any employee of the police department to be computed on the basis of that employee's time in service when the contract conferring those benefits was executed. Such a procedure would be cumbersome and unworkable.

There is no evidence of any prior conduct by the Comptroller which would bring this case within the ambit of *Kranker* v. *Levitt*, 30 N.Y.2d 574.

The relief requested in the petition is denied.

Submit judgment.

Dated: Troy, New York
July 25, 1972.

Exhibit G

Order Appealed From

At a Special Term of the Supreme Court of the State of New York, held in and for the County of Albany, in the County Courthouse, Albany, New York on the 12th day of May, 1972.

Present:

Hon. John T. Casey,
Justice.

(Same Title)

Petitioner having moved this Court by order to show cause dated and issued the 10th day of October, 1971 for an order directing the respondent to recalculate petitioner's retirement allowance so as to include therein all lump sum payments made to the petitioner in the form of termination pay and pay for unused sick leave, and respondent's motion to dismiss the petition upon objections in point of law having been denied by a prior order of this Court dated February 14, 1972, and respondent having served his answer to the petition and the petitioner having moved for summary judgment thereon,

Now, upon reading and filing the order to show cause aforesaid and the petition of Edward Lecci, verified the 3rd day of October, 1971, upon which it was granted, the notice of motion to dismiss the petition and affidavit of John S. Mauhs, sworn to on November 4, 1971, in support thereof, the order of Justice John H. Pennock, denying the motion as aforesaid, respondent's answer duly verified the 29th day of March, 1972, and an order to show cause dated and issued April 10, 1972 and the petition for summary judgment of Edward Lecci verified April 9, 1972, and after hearing Richard Hartman, Esq., attorney for petitioner, in support of the petitions and Louis J. Lefkowitz, Attorney General of the State of New York (John Q. Driscoll, Esq.,

Exhibit "G"

Order Appealed From

of counsel) attorney for respondent, in opposition thereto, and after due deliberation and a memorandum decision having been issued, it is hereby

ORDERED, ADJUDGED AND DECREED that the relief requested in the petition be and the same hereby is denied and the petition is dismissed without costs.

Dated: Troy, New York
August 11, 1972

Enter:

/s/ JOHN T. CASEY
Justice of the Supreme Court

Exhibit H

Notice of Appeal

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF ALBANY

In the Matter of the Application of

EDWARD LECCI,

Individually and for others similarly situated

Petitioner,

— against —

ARTHUR LEVITT, Comptroller of the State of New York and Administrator of the New York State Policemen's and Firemen's Retirement System,

Respondent

SIRS:

PLEASE TAKE NOTICE that the above named Petitioner, Edward Lecci, Individually and for others similarly situated, hereby appeals to the Appellate Division of the New York Supreme Court, in and for the Third Department, from an Order entered in the above entitled action in favor of the above named Respondent, Arthur Levitt, Comptroller of the State of New York and Administrator of the New York State Policemen's and Firemen's Retirement System, entered in the Office of the Clerk of the County of Albany, on the 16th day of August, 1972, and this appeal is taken from such and every part of said Order as well as the whole thereof.

Dated: Mineola, New York
August 23, 1972

Yours, etc.

RICHARD HARTMAN, ESQ.
Attorney for Petitioner
Office & P. O. Address
300 Old Country Road
Mineola, New York 11501

Exhibit "H"

Notice of Appeal

To:

JOHN S. BARTLETT, JR.
County Clerk
County of Albany
Albany, New York

HON. LOUIS J. LEFKOWITZ
Attorney General of the State of New York
Attorney for Respondent
The Capitol
Albany, New York

Exhibit I

Decision of Appellate Division—Third Department.

APPELLATE DIVISION—THIRD DEPARTMENT.

May 31, 1973.

20676
20678
20677

IN THE MATTER

of

JOSEPH P. WEBER, on Behalf of Himself and All Others Similarly Situated,

Appellants,

v.

ARTHUR LEVITT, as Comptroller of the State of New York and Administrator of the New York State Policemen's and Firemen's Retirement System,

Respondent.

IN THE MATTER

of

EDWARD LECCI, on Behalf of Himself and All Others Similarly Situated,

Appellants,

v.

ARTHUR LEVITT, as Comptroller of the State of New York and Administrator of the New York State Policemen's and Firemen's Retirement System,

Respondent.

Exhibit "I"

Decision of Appellate Division—Third Department

In the Matter

of

Daniel Greenwald, Individually and as Representative of the Nassau County Patrolmen's Benevolent Association,

Appellant,

v.

Arthur Levitt, as Comptroller of the State of New York and Administrator of the New York State Policemen's and Firemen's Retirement System,

Respondent.

Judgment in the Weber case affirmed, without costs.

Judgment in the Lecci case affirmed, without costs.

Order in the Greenwald case, modified, on the law, so as to declare so much of section 431 of the Retirement and Social Security Law as prohibits the inclusion of termination pay in final average salary unconstitutional, and, as so modified, affirmed, without costs.

Opinion per Greenblott, J.

Herlihy, P. J., Cooke, Kane and Main, JJ., concur.

Exhibit "I"

Opinion of Appellate Division—Third Department.

#20676
#20678
#20677

STATE OF NEW YORK, SUPREME COURT,

APPELLATE DIVISION—THIRD DEPARTMENT.

IN THE MATTER

of

JOSEPH P. WEBER on Behalf of Himself and All Others Similarly Situated,

Appellants,

against

ARTHUR LEVITT, as Comptroller of the State of New York and Administrator of the New York State Policemen's and Firemen's Retirement System,

Respondent.

IN THE MATTER

of

EDWARD LECCI, on Behalf of Himself and All Others Similarly Situated,

Appellants,

against

ARTHUR LEVITT, as Comptroller of the State of New York and Administrator of the New York State Policemen's and Firemen's Retirement System,

Respondent.

Exhibit "I"

Opinion of Appellate Division—Third Department

IN THE MATTER

of

DANIEL GREENWALD, Individually and as Representative of the Nassau County Patrolmen's Benevolent Association,

Appellants,

against

ARTHUR LEVITT, as Comptroller of the State of New York and Administrator of the New York State Policemen's and Firemen's Retirement System,

Respondent.

Argued, April 17, 1973.

Before:

Hon. J. Clarence Herlihy,
Presiding Justice,
Hon. Louis M. Greenblott,
Hon. Lawrence H. Cooke,
Hon. T. Paul Kane,
Hon. Robert G. Main,
Associate Justices.

APPEAL, in the first above-entitled action, from a judgment of the Supreme Court at Special Term (John T. Casey, J.), entered August 16, 1972 in Albany County, which denied petitioner's application in a proceeding pursuant to CPLR article 78, for an order enjoining respondent from recomputing petitioner's final average salary as defined in paragraph (b) of subdivision 9 of section 302 of the Retirement and Social Security Law by excluding certain items.

Exhibit "I"

Opinion of Appellate Division—Third Department

APPEAL, in the second above-entitled action, from a judgment of the Supreme Court at Special Term (John T. Casey, J.), entered August 16, 1972 in Albany County, which dismissed petitioner's application, in a proceeding pursuant to CPLR article 78, for an order directing the respondent to recalculate petitioner's final average salary as defined in paragraph (b) of subdivision 9 of section 302 of the Retirement and Social Security Law by including certain items.

APPEAL, in the third above-entitled action, from an order of the Supreme Court at Special Term (John T. Casey, J.), entered August 16, 1972 in Albany County, which, in an action for a declaratory judgment, denied, with one exception, plaintiff's motion for summary judgment and declared that section 431 of the Retirement and Social Security Law was not unconstitutional as applied to lump sum payments for accrued sick leave credits and termination pay.

Richard Hartman, for appellants, 300 Old Country Road, Mineola, New York 11501.

Louis J. Lefkowitz, Attorney-General (John Q. Driscoll and Ruth Kessler Toch of counsel), for respondent. The Capitol, Albany, New York 12224.

Opinion for Affirmance and Modification.

GREENBLOTT, J.:

These are appeals from: (1) a judgment of the Supreme Court at Special in the first above-entitled action, entered August 16, 1972 in Albany County, which denied petitioner's application, in a proceeding pursuant to CPLR article 78, for an order enjoining the respondent from recomputing petitioner's final average salary as defined in paragraph (b) of subdivision 9 of section 302 of the Retirement and Social Security Law by excluding

certain items; (2) a judgment of the Supreme Court at Special Term in the second above-entitled action, entered August 16, 1972 in Albany County, which dismissed petitioner's application, in a proceeding pursuant to CPLR article 78, for an order directing the respondent to recalculate petitioner's final average salary as defined in paragraph (b) of subdivision 9 of section 302 of the Retirement and Social Security Law by including certain items; and (3) an order of the Supreme Court at Special Term in the third above-entitled action, entered August 16, 1972 in Albany County, which, in an action for a declaratory judgment, denied, with one exception, plaintiff's motion for summary judgment and declared that section 431 of the Retirement and Social Security Law was not unconstitutional as applied to lump sum payments for accrued sick leave credits and termination pay.

These cases raise questions as to which items should be included in computing for pension purposes the "final average salary" of appellant, employees of the Nassau County Police Department and members of the Policemen's and Firemen's Retirement System. Certain statutory provisions are applicable to all three cases. Unless otherwise indicated, all references are to the Retirement and Social Security Law.

Paragraph (b) of subdivision 9 of section 302 defines "Final average salary" as follows:

> In the case of a member having credit for three years or more of member service, such term shall mean his highest average annual compensation earned during any three consecutive years of member service for which he is credited, provided that a member by written request, filed with the comptroller prior to the effective date of retirement and in form satisfactory to the comptroller, may

> select any other period of three consecutive years of member service for which he is credited.

At the core of the above definition is the term "annual compensation", which is itself defined in paragraph (a) of subdivision 2 of section 302 as "[t]he salary or wages *annually earnable* by a member, including maintenance, or any allowance in lieu thereof, received by the member." (Italics added.)

THE WEBER CASE.

Appellant Weber, a patrolman in the Nassau County Police Department for over 20 years, retired on February 23, 1970. The contract then in effect between Nassau County and the Patrolmen's Benevolent Association of the Nassau County Police Department provided, *inter alia*, that upon retirement after 20 years of service, a patrolman was entitled to a lump sum payment for termination pay computed on the basis of three days' pay for each year of completed service. Respondent computed appellant's "final average salary" by including all forms of compensation received during the final three years, including the lump sum termination payment in its entirety. In 1972, respondent, alleging that an error had been made, recomputed the final average salary, taking into consideration only nine days' (three days for each of the last three years) worth of termination pay, thereby reducing appellant's benefits. Special Term found that termination pay had been earned at a rate of three days per year of service, and denied the petition.

Appellant contends that, since paragraph (d) of subdivision 9 of section 302, which sets forth an alternative means of computing "final average salary", prohibits the inclusion of "any form of termination pay", the Legislature must be presumed to have intended to allow the inclusion of the full amount of termination pay

in "final average salary" as computed under paragraph (b) of subdivision 9 of section 302, since the latter contains no such prohibition. While we agree that the absence from paragraph (b) of subdivision 9 of a prohibition such as that contained in paragraph (d) of subdivision 9 evinces a legislative intent that some termination pay may be taken into account such termination pay as may be included is still limited to that amount which represents "compensation earned" during a three-year period.

Appellant urges that since, under the contract, termination pay is received "[u]pon separation from service, after twenty (20) years", such pay is only "earned" upon retirement. We disagree. Termination pay could be treated as having been earned in the twentieth year of service, as appellant contends, only if such pay was a component of compensation for the twentieth year alone. We view termination pay as having been earned by a full 20 years of service, and, of course, each year of service contributed equally to the amount of pay so earned. This conclusion is borne out by the fact that the quantum of termination pay is directly related to the total numbers of years of service.

Furthermore, the only significance of the twentieth year is that previously earned termination credits then become vested. If the first year of vesting was to be treated as the year in which the first 20 years' credits were earned, a patrolman who had served an additional three years, thereby earning an additional three days' credits per year which vested at the end of each such year, would have a lesser amount of termination pay included in his "final average salary" than a fellow officer with "only" 20 years total service. Obviously, the Legislature could not have intended such an illogical result. Since termination pay must be treated as earned over the 20-year period rather than in the twentieth year, the Comptroller was correct in determining that

the amount "earned during [the last] three consecutive years" (§302, subd. 9, par. [b]) is that amount representing three years' worth of termination credits (nine days).

Appellant further contends that for two years he had received retirement benefits which had been determined by including in "final average salary" the full amount of termination pay, and thus a contractual right to the continuance of such payments was established between himself and the Retirement System in accordance with the decision of the Court of Appeals in *Kranker v. Levitt* (30 N. Y. 2d 574). Such a contract, it is urged, cannot be impaired without violating section 7 of article V of our State Constitution.[1] *Kranker* held section 431 unconstitutional insofar as that statute prohibited the inclusion of a lump sum payment for unused vacation pay in the final average salary of members of the Retirement System prior to the statute's effective date.[2] In 1957, 15 years prior to the effective date of section 431, the Comptroller had begun the practice of including the cash value of accrued but unused vacation credits—up to a maximum of 30 days—in computing final average salary. The Court of Appeals held that a contract had been established and that the applicable provision of section 431 could not be retroactively applied to employees who had been members of the system prior to the effective date of section 431 without violating the contract.

---

[1] §7 [Membership in retirement systems; benefits not to be diminished nor impaired]

After July first, nineteen hundred forty, membership in any pension or retirement system of the state or of a civil division thereof shall be a contractual relationship, the benefits of which shall not be diminished or impaired

[2] The constitutionality of section 431 as regards other forms of lump sum payments, including termination pay, is again before us in the *Greenwald* case.

Exhibit "I"

Opinion of Appellate Division—Third Department

We are in accord with Special Term's holding that no contract had been established requiring the inclusion of *full* termination pay in the computation of final average salary. In our view, *Kranker* did not hold that a course of action of the Comptroller must have existed for a given period of time before constituting a contract,[1] for any determination of a specific period of time could only be done on a purely arbitrary basis. Rather, we feel that the time period involved in *Kranker* was not as pertinent to the decision as the fact that the Comptroller's course of action in including the payments there involved was a reasonable one. If the Comptroller had embarked upon a course of conduct in conflict with clearly-defined legislative policy, no valid contract could have resulted therefrom. To hold otherwise would give the Comptroller license to defy the will of the Legislature by making illegal payments and then sanctifying such illegal payments as constitutionally unimpairable contracts. In the present case, the inclusion of the full termination pay would, as previously discussed, do violence to the legislative mandate that "annual compensation" be limited to compensation "annually earnable" (§302, subd. 2, par. [a]) as opposed to compensation received in any given year; therefore the Comptroller's act of including the full payment was lacking in legal authority and cannot rise to the status of a contract. By way of comparison to *Kranker*, we cannot overlook the fact that the Comptroller in that case had limited the includable payments to a maximum of 30 days. Such a limitation bore a reasonable relation to the amount of unused vacation pay which might have been actually earned in a three-year period, and, since the amount of unused vacation pay which may be earned can vary from

[1] In its decision in *Greenwald*, Special Term did so read *Kranker* in determining the applicability of section 431 to termination pay. As shall be demonstrated here and in our discussion of *Greenwald*, we think that position was erroneous.

year to year, unlike termination pay which is earned on the basis of a specified number of days per year, the selection of that limitation was a reasonable exercise of administrative discretion. The same conclusion could not be reached as to the inclusion of termination pay for a 20-year period, but it would be valid as applied to the Comptroller's subsequent decision to include termination pay for three years in the computation of "final average salary" under paragraph (b) of subdivision 9 of section 302. Thus, a contract was established as to the practice of including some termination pay in "final average salary", but not as to the amount which the Comptroller had been including prior to his decision to recompute. We therefore hold that, as to employees who were members of the retirement system prior to the effective date of section 431 and who receive, upon retirement, termination pay pursuant to contracts effective prior to that date, the inclusion of termination pay on an entitlement basis of three years in the computation of "final average salary" under paragraph (b) of subdivision 9 of section 302 constitutes a contract the benefits of which cannot be diminished or impaired by virtue of section 7 of article V of the Constitution.

The judgment in the *Weber* case should be affirmed, without costs.

THE LECCI CASE.

Appellant Lecci retired from the Nassau County Police Department on January 2, 1971, where he had been employed for more than 21 years. Under a contract then in effect between the employer and the Patrolmen's Benevolent Association, an employee, upon retirement in good standing after 20 years' service, became entitled to a lump sum cash payment for termination pay computed on an entitlement basis of three days for each year of service, and four days for each year in com-

pleted service after January 1, 1972.[4] In addition, such an employee became entitled to a lump sum payment of 50% of the value of his accumulated and unused sick leave up to a maximum of 165 days. In computing appellant's "final average salary" under paragraph (b) of subdivision 9 of section 302 respondent included only three-twenty-firsts of the termination pay (representing three days per year for three years), and none of the sick pay. Appellant instituted this proceeding to compel respondent to include the full amount of both lump sum payments in his "final average salary". Special Term dismissed the petition.

With regard to termination pay, the same issues are presented as were before us in the *Weber* case, and our decision there is controlling. The respondent was not required to include more than nine days' termination pay in Lecci's "final average salary".

The includability of a lump sum payment for sick pay presents a somewhat different problem, for there is no prior administrative practice which might be said to give rise to a contract. Appellant argues that the enactment in section 431 of a provision prohibiting the inclusion of any sick leave pay in "final average salary" must be read as indicating that, prior to the enactment of that statute, sick leave pay was to be included in the computation. Special Term rejected this contention, holding that the provisions of sections 333 and 341 (subd. [j]) prohibited the inclusion of unused sick leave payments. We agree with this conclusion. Section 333 provides that a participating employer may, by the adoption of a resolution in a prescribed manner, "provide for its own employees any of the benefits provided [for state employees] * * * listed in", among other provisions, "a. subdivision j of section three hundred forty-one". Subdivision (j) of section 341 provides, in essence, that State employees who are members of the Re-

[4]The four-day provision would not apply to Lecci, since he did not have any years of service after January 1, 1972.

tirement System shall be granted service credit for accumulated but unused sick leave upon retirement, "but such credit shall not * * * [c] be considered in computing final average salary." Special Term held that, since a resolution had not been adopted by the Nassau County Police Department pursuant to section 333, sick leave credits could not be taken into consideration in any form in computing benefits. We note, however, that, prior to the enactment of section 333 by chapter 467 of the Laws of 1970 and the enactment of subdivision (j) of section 341 by chapter 457 of the Laws of 1970, the Appellate Division, Second Department had held that collective bargaining agreements which gave to employees the right to receive accumulated but unused sick leave payments were valid and enforceable (*Matter of Teachers Assn., Cent. High School Dist. No. 3 [Board of Educ., Cent. High School Dist. No. 3, Nassau County]*, 34 A. D. 2d 351). It therefore appears that the enactment of sections 333 and 341 (sub. [j]), was not necessary to enable public employers to grant to their employees such lump sum payments for sick leave, but rather the enactment of these provisions merely codified existing law. However, in providing that such credit "shall not * * * be considered in computing final average salary" the Legislature was not merely restating the law as it existed, but must have intended to prohibit the inclusion of such payments in final average salary regardless of whether the source of those payments was a collective bargaining agreement such as that in the *Teachers Association* case (*supra*), or a resolution adopted pursuant to section 333. Of course, such a prohibition would be applicable to any contract entered into subsequent to its enactment. In complying with this legislative mandate, the Comptroller has not violated any of the petitioner's rights, be they contractual or constitutional. This conclusion is not out of harmony with our decision in the *Weber* case for two reasons: first, as previously noted, no contract within the meaning of the *Kranker*

case was established by an administrative practice, and second, prior to the enactment of section 431, there was no provision comparable to that contained in section 341 (subd. [j]) by which the inclusion of termination pay in the computation of retirement benefits was prohibited.

The judgment in the *Lecci* case should be affirmed, without costs.

THE GREENWALD CASE.

The questions in this appeal are raised by an action for declaratory judgment. Appellant and those he represents have not retired from their employment with the Nassau County Police Department. By chapter 503 of the Laws of 1971, the Legislature enacted section 431, effective April 1, 1972. That section provides, *inter alia*, that lump sum payments for accumulated but unused sick leave, accumulated but unused vacation pay, and "any form of termination pay" shall not be included in the salary base for computing retirement benefits. On March 8, 1971, a collective bargaining agreement was entered into between the Nassau County Police Department and the Policemen's Benevolent Association, retroactive to January 1, 1971, providing that, after 20 years of service, retirees would receive termination pay computed on a basis of three days per year of completed service and four days for each year of such service on or after January 1, 1972. The agreement also contained provisions for lump sum payments for accumulated and unused sick leave and lump sum payments for accumulated by unused vacation credit. Appellant sought a declaration that section 431 was unconstitutional under section 7 of article V of the New York State Constitution. Special Term denied the requested relief "except * * * as to the inclusion of vacation pay to the extent indicated in *Kranker v. Levitt* * * *".

At the outset, we reaffirm our holding in the *Weber* and *Lecci* cases as to how much, if any, termination pay

and sick leave pay is includable in computing final average salary. In determining whether section 431 works an unconstitutional impairment of contractual rights, the question is whether individuals, in accepting or continuing in public employment, did so in reliance upon a reasonable expectation that their retirement benefits would be computed by taking into consideration certain forms of compensation which the public employer had voluntarily chosen to pay. The fact that a contract grants to them the right to receive such payments does not, of course, in and of itself, establish a right to have the payments included in the computation of retirement benefits.

Considering the applicability of section 431 to termination pay, we refer to our holding today in the *Weber* case, and to the reasoning in the *Kranker* case, and conclude that a "contract" having been established with regard thereto, the retroactive application of section 431 would indeed constitute a deprivation of constitutionally protected rights. We therefore hold that employees who were members of the retirement system on or before the effective date of section 431, and who were the beneficiaries of collective bargaining agreements entered into on or before that date, shall be entitled to have included in the computation of their "final average salary" an amount of termination pay such as has been accrued in the last three years of their employment.[5]

---

[5]Since the contract provides for entitlement to four days' termination pay for years of service on or after January 1, 1972, the maximum number of days which can be included in final average salary, will be nine for employees retiring on or before December 31, 1972, 10 for employees retiring on or after January 1, 1973 but not later than December 31, 1973, 11 for employees retiring on or after January 1, 1974 but not later than December 31, 1974, and 12 for employees retiring on or after January 1, 1975, provided that the number of days of entitlement per year is not reduced by a collective bargaining agreement which is hereafter entered into.

Exhibit "I"

Opinion of Appellate Division—Third Department

In the case of accumulated but unused sick leave credits, we have held in the *Lecci* case that there was a valid statutory prohibition against the inclusion of such payments in final average salary, and that prior to the enactment thereof, no administrative practice, such as would establish a *Kranker*-type contract, had evolved. Thus, there was no reasonable basis for the expectation that such sick leave payments would be included in the computation of retirement benefits. Therefore, section 431 is fully applicable to such payments and in no manner unconstitutional. The fact that a lump sum payment for accumulated but unused sick leave has been held not to be an unconstitutional gift of public funds (*Matter of Teachers Assn., Cent. High School Dist. No. 3 [Board of Educ., Cent. High School Dist. No. 3, Nassau County]*, *supra*) does not, as urged by appellant, require the conclusion that there is a constitutional right to the inclusion of such payments in the computation of retirement benefits, and nothing in our decision today bars the making of such lump sum payments.

Appellant challenges the decision at Special Term insofar as that decision limited the number of vacation days which could be included in the computation of final average salary to 30 in reliance upon the limitations imposed in the *Kranker* case. Appellant contends that the limitation in *Kranker* was based upon the fact that the collective bargaining agreement under which Kranker's rights were determined itself limited the number of vacation days for which a lump sum payment could be made to 30. Here, however, the collective bargaining agreement would, in some circumstances, allow employees to accrue unused vacation pay to a maximum of 60 days, and appellant contends that the lump sum payment, which is to be included in the computation of final average salary, should be measured against this maximum. We disagree. The limitation to

60 of the number of unused vacation days for which a lump sum payment will be made does not bear any reasonable relation to the actual number of unused vacation days which are "earned" in any given year of service. Therefore, that limitation should similarly bear no rleation to the maximum number of days of vacation credit which can be included in the determination of final average salary. Moreover, the decision in *Kranker* to allow the inclusion of up to 30 days' vacation pay was based upon a contract established by administrative practice, rather than by the terms of a particular collective bargaining agreement. In fact, nothing in the *Kranker* decision makes reference to a limitation in the collective bargaining agreement of which *Kranker* was a beneficiary, the 30-day limitation having been established by the Comptroller many years earlier apparently without regard to the agreement covering *Kranker*. We therefore conclude that the contract benefits which are constitutionally protected from impairment by section 431 in this case are similarly limited to those which were so protected under the *Kranker* decision.

Judgment in the *Greenwald* case should be directed to be entered declaring that so much of section 431 of the Retirement and Social Security Law as prohibits the inclusion of termination pay in final average salary is unconstitutional as to persons who were members of the Retirement System on or before April 1, 1972 and for whom the right to receive termination pay existed pursuant to collective bargaining agreements effective prior to April 1, 1972, provided that the amount of termination pay which may be so included is limited to such amounts as are lawful under our decision in *Weber v. Levitt*, and declaring subdivision (a) and (b) of section 431 constitutional. The order should thus be modified, on the law, so as to declare section 431 unconstitutional as herein stated, and, as so modified, affirmed, without costs.

Exhibit J

Order Appealed From.

At a Term of the Appellate Division of the Supreme Court of the State of New York, held in and for the Third Judicial Department at the Justice Building in the City of Albany, New York, commencing on the 9th day of April, 1973.

Present:

Hon. J. Clarence Herlihy,
Presiding Justice.
Hon. Louis M. Greenblott,
Hon. Lawrence H. Cooke,
Hon. T. Paul Kane,
Hon. Robert G. Main,
Associate Justices.

In the Matter

of

Edward Lecci, on behalf of Himself and All Others Similarly Situated,

Appellants,

against

Arthur Levitt, as Comptroller of the State of New York and Administrator of the New York State Policemen's and Firemen's Retirement System,

Respondent.

Petitioner Edward Lecci, on behalf of himself and all others similarly situated, having appealed from a judgment of the Supreme Court of Albany County, entered on the 16th day of August, 1972, in the office of

Exhibit "J"

Order Appealed From

the Clerk of the County of Albany, dismissing the petition, and said appeal having been presented during the above-stated Term of this Court, and having been argued by Richard Hartman, Esq., of counsel for appellant, and by John Q. Driscoll, Esq., of counsel for the respondent, and after due deliberation, the Court having rendered a decision on the 31st day of May, 1973 (Opinion per Greenblott, J.), it is hereby

ORDERED that the judgment appealed from be and the same is hereby affirmed without costs.

Enter:

/s/ JOHN J. O'BRIEN
Clerk

Dated and Entered: June 7, 1973

A True Copy
JOHN J. O'BRIEN
Clerk

Exhibit K

Order Granting Leave to Appeal to the Court of Appeals.

COURT OF APPEALS,

STATE OF NEW YORK.

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the 19th day of September A. D. 1973.

Present,

Hon. Stanley H. Fuld, Chief Judge, presiding.

Mo. #638

IN THE MATTER

of

The Application of EDWARD LECCI, Individually and for others similarly situated,

Petitioner,

vs.

ARTHUR LEVITT, Comptroller of the State of New York and Administrator of the New York Policemen's and Firemen's Retirement System,

Respondent.

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon

Exhibit "K"

Order Granting Leave to Appeal to the Court of Appeals

the part of the appellant herein and papers having been duly submitted thereon and due deliberation thereupon had:

ORDERED, that the said motion be and the same hereby is granted.

JAMES M. FLAVIN
Clerk

(Seal)

State of New York
Court of Appeals

No. 288A 73

In the Matter of the Application of Edward Lecci, Individually &c.,

Appellant,

vs.

Arthur Levitt, Comptroller of the State of New York, &c.,

Respondent.

No. 288 B 73

In the Matter of the Application of Daniel Greenwald, &c.,

Appellant,

vs.

Arthur Levitt, Comptroller of the State of New York &c.,

Respondent.

MEMORANDUM

This memorandum is uncorrected and subject to revision before publication in the New York Reports.

No. 288 C 73

In the Matter of the Application of Joseph P. Weber, Individually &c.,

Appellant,

vs.

Arthur Levitt, Comptroller of the State of New York &c.,

Respondent.

MEMORANDUM:

The order of the Appellate Division in each of the three proceedings should be affirmed, without costs, on the opinion of Mr. Justice Louis M. Greenblott at the Appellate Division. Termination pay, although includible in the "final average salary" for pension purposes, was properly limited to that portion attributable to the last three years of service. The Appellate Division correctly interpreted the limited effect of Kranker v. Levitt (30 N Y 2d 574) as creating a vested right to inclusion only if based on administrative construction and practice for a "given" or extended period of time, and then, only to the extent reasonable (see, Matter of Hessel v. N.Y.C. Employees' Retirement System, 33 N Y 2d 381, 385). Hence, vacation pay was limited to thirty days as was done in the Kranker case; and unused sick leave credits were wholly excluded as neither warranted by law nor administrative construction (see, Retirement & Social Security Law, § 431).

* * * * * * * * *

In each case:
Order affirmed, without costs, in a memorandum. All concur.

Exhibit M

Summons

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

(Same Title)

Plaintiff designates Albany County as the place of trial. The basis of the venue is office of Defendant.

Plaintiff resides at 250 East Ave., Valley Stream, New York.

Nassau County P.B.A. 1550 Franklin Ave., Mineola, New York.

To the above named Defendant

YOU ARE HEREBY SUMMONED to answer the complaint in this action and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the Plaintiff's Attorney(s) within 20 days after the service of this summons, exclusive of the day of service (or within 30 days after the service is complete if this summons is not personally delivered to you within the State of New York); and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated: Mineola, New York
February 14, 1972

RICHARD HARTMAN
Attorney for Plaintiff
Office and Post Office Address
300 Old Country Road
Mineola, New York 11501

Exhibit "M"

Complaint in Action for Declaratory Judgment

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

(Same Title)

Plaintiffs, by their attorney, Richard Hartman, Esq., as and for their complaint to obtain a judgment herein declaring the rights and legal relations of the parties to this action in the respect hereinafter set forth, allege:

1. That at all of the times hereinafter mentioned, the Plaintiff, Daniel Greenwald, was and still is a member of the Police Department of the County of Nassau, having been appointed to the said position on the 3rd day of June, 1957.

2. That at all times hereinafter mentioned, Plaintiff, Daniel Greenwald, by virtue of the fact that he was a policeman employed by the Nassau County Police Department, a participating employer in the New York State Policemen's and Firemen's Retirement System is entitled to all the benefits thereunder.

3. That at all the times hereinafter mentioned the Nassau County Patrolmen's Benevolent Association is the certified bargaining agent for patrolmen, sergeants, lieutenants and captains of the Nassau County Police Department.

4. That at all times hereinafter mentioned, Respondent Arthur Levitt, is the duly elected Comptroller of the State of New York and the person responsible by law for the Administration of the New York State Policemen's and Firemen's Retirement System, and thereby is responsible for enforcing Section 431 of the Retirement and Social Security Law of the State of New York. A copy of the foregoing section is hereto annexed as Exhibit "A" and made a part hereof.

5. That Section 431 of the Retirement and Social Security Law of the State of New York which was added by Chapter 503 of the Laws of 1971, shall go into effect April 1, 1972.

6. That Section 431 of the Retirement and Social Security Law of the State of New York is unconstitutional as it applies to members of the Nassau County Police Department, who were members of said department prior to April 1, 1972 in that it violates Article V, Section 7 of the New York State Constitution (see Exhibit "B" annexed hereto) since Section 431 of the Retirement and Social Security Law exempts from the salary base for the computation of retirement benefits any of the following earned or received by a Nassau County Police Officer after April 1, 1972:

a. Lump sum payments for deferred compensation sick leave, accumulated vacation or other credits for time not worked,

b. any form of termination pay,

c. any additional compensation paid in anticipation of retirement, or

d. that portion of compensation earned during any twelve months included in such salary base period which exceeds that of the preceding twelve months by more than "twenty per centum".

7. That the above designated forms of compensation that are to be excluded from the salary base for the computation of retirement benefits for Nassau County Police Officers have to date been acknowledged, either expressly or impliedly, in total or in part, as amounts that are properly the subject matter of what constitutes the term "final

Exhibit "M"

Complaint in Action for Declaratory Judgment

average salary" as defined under Section 302 (9) (b) of the Retirement and Social Security Law of the State of New York.

8. That by so exempting the above items from the salary base from which there is computed the retirement benefits of a retiree who was a member of the Nassau County Police Department prior to April 1, 1972, the New York State constitutional mandate of Article V, Section 7 that specifically prohibits any impairment or diminishing of retirement benefits from any person or retirement system of the State of New York is violated.

9. That by reason of the foregoing, Plaintiff and all other members of the police department are in danger of suffering great harm and irreparable damage and injury for which he and they have no adequate remedy in law.

WHEREFORE, Plaintiff demands that the Court declare that the rights and other legal relations of the parties herein are as follows:

a. That Section 431 of the Retirement and Social Security Law of the State of New York be declared unconstitutional and invalid.

b. That the Defendants be restrained from promulgating and enforcing this and other similar legislation which is derogative of the constitutional rights of the members of this department.

c. For such other, further, and different relief as to the Court may seem just and proper in the circumstances, together with the costs and disbursements of this action.

Dated: Mineola, New York
February 14, 1972.

RICHARD HARTMAN, ESQ.,
Attorney for Plaintiff
Office & P.O. Address
300 Old Country Road
Mineola, New York 11501
(516) PI 2-9000

EXHIBIT A

TO COMPLAINT

§131. Salary base for computing retirement benefits in any retirement or pension plan to which the state or municipality thereof contributes, the salary base for the computation of retirement benefits shall in no event include any of the following earned or received, on or after April first, nineteen hundred seventy-two:

1. lump sum payments for deferred compensation, sick leave, accumulated vacation or order credits for time not worked,

2. any form of termination pay,

3. any additional compensation paid in anticipation of retirement, or

4. that portion of compensation earned during any twelve months included in such salary base period which exceeds that of the preceding twelve months by more than twenty per centum.

Exhibit "M"

"After July first, nineteen hundred forty, membership in any pension or retirement system of the state or of a civil division thereof shall be a contractual relationship, the benefits of which shall not be diminished or impaired."

Exhibit N

Answer

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

(Same Title)

The defendant, answering the complaint of the plaintiff herein, by his attorney, Louis J. Lefkowitz, Attorney General of the State of New York:

FIRST: Admits each and every allegation set forth and contained in the paragraphs of the complaint numbered and designated "4" and "5".

SECOND: Denies knowledge or information sufficient to form a belief as to the allegations contained in paragraphs numbered "1", "2" and "3".

THIRD: Denies each and every allegation set forth in the paragraphs numbered "6", "7", "8" and "9".

WHEREFORE, defendant respectfully prays for judgment dismissing the complaint or, in the alternative, declaring that section 431 of the Retirement and Social Security Law of the State of New York, as added by chapter 503 of the Laws of 1971, is constitutional and valid.

Dated: Albany, New York

March 7, 1972.

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendant
Office & P.O. Address
The Capitol
Albany, New York 12224

Exhibit O

Notice of Motioi for Summary Judgment

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

(Same Title)

SIRS :

PLEASE TAKE NOTICE, that upon the affidavit of Daniel Greenwald, sworn to on the 20 day of March, 1972, the summons, complaint and answer heretofore served herein, a motion pursuant to CPLR 3212 will be made at a Special Term of this Court to be held at the courthouse thereof, located at the County Courthouse, Albany, New York, on the 14 day of April 1972 at 9:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order striking out the defendant's answer and directing the entry of summary judgment in favor of the plaintiff and against the defendant for the relief demanded in the complaint, upon the ground that there is no defense to the cause of action alleged in the complaint and for such other and further relief as may be just, proper, and equitable.

PLEASE TAKE FURTHER NOTICE, that pursuant to CPLR 2214 (b) answering affidavits, if any, are required to be served upon the undersigned at least five days before the return date of this motion.

Dated: March 20, 1972
Mineola, N.Y.

Yours, etc.

RICHARD HARTMAN
Attorney for Petitioner
Office & P.O. Address
300 Old Country Road,
Mineola, New York 11501

Exhibit "O"

Notice of Motion for Summary Judgment

To:

Louis J. Lefkowitz
Attorney General of the
State of New York
Attorney for Defendant
Office & P.O. Address
The Capitol
Albany, New York 12224

Exhibit "O"

Affidavit in Support of Motion for Summary Judgment

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

State of New York
County of Nassau ss.:

DANIEL GREENWALD, being duly sworn, deposes and says:

1. I am the Plaintiff in the above entitled action.

2. The above entitled action was brought for a declaratory judgment, seeking to have Section 431 of the Retirement and Social Security Law of the State of New York declared unconstitutional and therefore invalid.

3. The above entitled action was commenced by the service upon the defendant on the 18th day of February, 1972, of a summons and complaint, copies of which are annexed hereto as Exhibit "A".

4. On the 7th day of March, 1972, the defendant duly appeared in the above entitled action by Louis J. Lefkowitz, his attorney, who served an answer, a copy of which is annexed hereto as Exhibit "B", upon Richard Hartman, Esq., my attorney. Said answer contained specific denials as to the allegations set forth in the above referenced complaint.

5. I believe that there is no defense to the cause of action arose are as follows:

6. The facts and circumstances upon which the cause of actio narose are as follows:

a. Plaintiff, Daniel Greenwald, was and still is a member of the Police Department of the County of Nassau, State of New York, having been appointed to the said position on the 3rd day of June, 1957.

Exhibit "O"

Affidavit in Support of Motion for Summary Judgment

b. Plaintiff, Daniel Greenwald, by virtue of the fact that he was and still is a policeman employed by the Nassau County Police Department, a participating employer in the New York State Policemen's and Firemen's Retirement System, is therefore entitled to all the benefits thereunder.

c. Plaintiff, Daniel Greenwald, at the commencement of this action, was and still is the elected President of the Nassau County Patrolmen's Benevolent Association, the certified bargaining agent for patrolmen, sergeants, lieutenants and captains of the Nassau County Police Department.

d. Section 431 of the Retirement and Social Security Law of the State of New York was added by Chapter 563 of the 1971 Session Laws of the State of New York, effective April 1, 1972, and states:

> §431. Salary base for computing retirement benefits In any retirement or pension plan to which the state or municipality thereof contributes, the salary base for the computation of retirement benefits shall in no event include any of the following earned or received, on or after April first, nineteen hundred seventy-two:
>
> 1. lump sum payments for deferred compensation, sick leave, accumulated vacation or other credits for time not worked,
>
> 2. any form of termination pay,
>
> 3. any additional compensation paid in anticipation of retirement, or
>
> 4. that portion of compensation earned during any twelve months included in such salary base period which exceeds that of the preceding twelve months by more than twenty per centum.

e. Section 431 of the Retirement and Social Security Law of the State of New York is unconstitutional as it applies to members of the Nassau County Police Department who were members of said department prior to April 1, 1972 in that it violates Article V, Section 7 of the New York State Constitution (see Exhibit "C" annexed hereto) since Section 431 of the Retirement and Social Security Law exempts from the salary base for the computation of retirement benefits heretofore acknowledged, either expressly or impliedly, in total or in part, compensation that is properly the subject matter of what constitutes the term "final average salary" as defined under Section 302 (9) (b) of the Retirement and Social Security Law of the State of New York, thereby diminishing and/or impairing the benefits to which Plaintiff is entitled as per his contractual relationship with respect to the New York State Policemen's and Firemen's Retirement System.

f. Prior to the enactment of Section 431 of the Retirement and Social Security Law of the State of New York, Plaintiff, according to the contractual provisions negotiated pursuant to the Taylor Law by and between the County of Nassau and the Nassau County Patrolmen's Benevolent Association, was entitled, upon retirement, to receive a lump sum payment of earned monies representative of entitlements comprising monies for accumulated unused sick time, monies for accumulated unused vacation time and monies for termination pay.

g. That prior to the effective date of Section 431 of the Retirement and Social Security Law of the State of New York, members of the Retirement System, inclusive of Plaintiff, did in fact have included within the definition of the term "final average salary" as defined under Section 302 (9) (b) of the Retirement and Social Security Law of the State of New York, compensation received upon retirement in the form of said lump sum payment.

Exhibit "O"

Affidavit in Support of Motion for Summary Judgment

h. That by virtue of the fact that said lump sum payment is recognized by the Retirement System as being tendered in consideration for services actually rendered, that is "earned" and thus includable within the definition of the term "final average salary" pursuant to Section 302 (9) (b) of the Retirement and Social Security Law of the State of New York, and in accordance with provisions of a collectively bargained agreement between the Nassau County Patrolmen's Benevolent Association and the County of Nassau, a participating employer in the New York State Policemen's and Firemen's Retirement System, Plaintiff has acquired a vested right as to the benefits accruing therefrom which may not now be constitutionally impaired.

7. I believe that the cause of action is established sufficiently to warrant the court as a matter of law to direct judgment in my favor.

8. No previous application for the relief herein prayed for has been made.

WHEREFORE, deponent respectfully asks for an order striking out the defendant's answer and directing the entry of summary judgment in his favor against the defendant for the relief demanded in the complaint.

Dated: Mineola, New York

March 20, 1972

s/

Daniel Greenwald

(Verified on March 20, 1972.)

Exhibit "O"

EXHIBIT A TO AFFIDAVIT OF
DANIEL GREENWALD

SUMMONS & COMPLAINT

These are identical to the Summons and Complaint printed herein ~~at pages 7 to 11, and are not reproduced here.~~ as Exhibit "M" and are not reproduce

Exhibit P

Affidavit of John S. Mauhs in Opposition to Motion

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

State of New York
County of Albany ss.:

JOHN S. MAUHS, being duly sworn, deposes and says:

1. I am an attorney duly admitted to practice in the State of New York and for the past four years I have been employed as Counsel to the New York State Employees' Retirement System and the New York State Policemen's and Firemen's Retirement System.

2. I am fully familiar with the facts and circumstances of this action which give rise to this proceeding, and make this affidavit in opposition to plaintiff's motion for summary judgment.

3. The complaint in this action alleges that section 431 of the Retirement and Social Security Law, as added by chapter 503 of the Laws of 1971, is unconstitutional as it applies to members of the Nassau County Police Department who were members of said Department prior to April 1, 1972, in that it allegedly violates Article V, §7, of the New York State Constitution by impairing retirement benefits heretofore extended to such members. It is further alleged that certain forms of termination pay received by members of the Nassau County Police Department upon separation or retirement are properly includable in the computation of final average salary and that the defendant has acknowledged the inclusion of such forms of termination pay as retirement benefits.

4. In order to establish that section 431 is unconstitutional as an impairment of retirement benefits, plaintiff attempts to show that the items which he claims are properly includable in the computation of final average salary, in the absence of expressed statutory direction,

have been so established and acknowledged by action of the defendant; defendant in his answer has denied such acknowledgement or past practice except as hereinafter set forth.

5. Plaintiff attempts to meet the burden of proving that the various forms of termination pay have been so established and acknowledged simply by alleging, both in his complaint and his affidavit, that defendant has acknowledged "either expressly or impliedly" that such amounts are properly includable.

6. Deponent concedes that payment of the cash value of accrued and unused vacation credits has been recognized and declared to be includable in final average salary and as such a vested retirement benefit to members entitled to receive such payments and who were employed prior to April 1, 1972 (*Kranker* v. *Levitt,* N.Y.2d , 2/18/72).

7. The question of whether defendant has acknowledged the inclusion of termination pay based upon the product of a specified number of days for every year of service over 20 years, in whole or in part, in the computation of final average salary, which defendant denies, is presently before this Court in *Matter of Weber* v. *Levitt and Matter of Lecci* v. *Levitt.*

8. Defendant has never acknowledged as a part of final average salary payment of the cash value of unused sick leave by past practice or otherwise.

9. There is no showing in the complaint or affidavit to establish any acknowledgement or past practice of the defendant with respect to other forms of termination pay or increased compensation in the final 12 months of service which are now precluded in the computation of retirement allowances by section 431.

Exhibit "P"

Affidavit of John S. Mauhs in Opposition to Motion

10. There is no basis in this action for a general declaration of the unconstitutionality of section 431; any such declaration would be limited to benefits heretofore extended to identifiable members of the New York State Employees' Retirement System or the New York State Policemen's and Firemen's Retirement System prior to April 1, 1972.

11. The defendant's answer has raised several legal defenses to the complaint herein which, deponent submits, the defendant is entitled to have an adjudication upon.

/s/ JOHN S. MAUHS

(Sworn to on May 4, 1972.)

Exhibit Q

Reply Affidavit of Daniel Greenwald in Support of Motion

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

(Same Title)

State of New York
County of Nassau ss.:

DANIEL GREENWALD, being duly sworn, deposes and says:

1. I am the Plaintiff in the action herein, and am fully familiar with the facts and circumstances giving rise to this proceeding and make this Reply Affidavit in opposition to the Defendant's Affidavit in Opposition to my motion for Summary Judgment.

2. Defendant, in his Affidavit in Opposition concedes the fact that payment of the cash value of accrued and unused vacation credits has been recognized and is includable in the term "final average salary", and as such, is a vested retirement benefit to members entitled to receive such payments and who were employed prior to April 1, 1972.

3. With regards to termination pay, the Courts have acknowledged that termination pay is properly the subject matter of a collective bargaining agreement between a municipality and its employees and is not a constitutionally prohibited gift of public funds (See *Lecci* v. *Nickerson*, 63 Misc. 2d 756 (1970) 313 N.Y.S. 2d 474).

4. In addition, the Courts have to date recognized that payment of the cash value of unused sick leave upon retirement is not a gift and does not offend the New York State Constitution prohibition against the utilization of public funds as gifts, (See *Teachers Association, Central High School, District No. 3* v. *Board of Education, Central High School, District No. 3, Nassau County*, 312 NYS 2d 252 (1970).

Exhibit "Q"

Reply Affidavit of Daniel Greenwald in Support of Motion

5. That the full amount received upon retirement as termination pay and pay for unused sick leave are sums includable in the term "final average salary" is evident upon review of the definition of said term under Section 302, Subdivision 9 (b) of the New York State Retirement and Social Security Law (known as the 3 year bill). In particular, as defined in the 3 year bill, the term "final average salary" means the "... highest average annual compensation *earned* during any three consecutive years..." (emphasis added). With the above definition in mind, it should be noted that plaintiff's right to termination pay and/or pay for unused sick leave is only earned and becomes due and payable when plaintiff retires in good standing. If plaintiff resigns or is dismissed prior to his retirement, he would not be entitled to either termination pay or pay for unused sick leave. Thus, entitlement to said benefits is contingent upon plaintiff retiring in good standing and therefore, said benefits are *earned* at the time and by the act of retiring and are thus includable in the term "final average salary" as defined in the 3 year bill. (See *Moore, etc.* v. *Board of Education*, etc. 84 NYS 2d 417 (1948), affirmed, 299 NY 666.)

6. That plaintiff is entitled to the inclusion within the term "final average salary" of the total sum received as termination pay at the time of retirement is further evidenced by the fact that defendant, with regards to those members of the Nassau County Police Department who retire in 1970, did in fact include within the computation of their respective "final average salaries" the full amount of termination pay received upon retirement. Although defendant has attempted to revoke this prior acknowledgment by withholding retirement benefits from said retirees, said acknowledgment, nonetheless, remains as evidence of defendant's original interpretation of what was felt to be includable within the term "final average salary" under the 3 year bill.

Exhibit "Q"

Reply Affidavit of Daniel Greenwald in Support of Motion

7. In addition to the above, a combined reading of Section 302, Subdivision 9 (b) and (d) of the New York State Retirement and Social Security Law reinforces the conclusion that the term "final average salary" as set forth under Section 302, Subdivision 9 (b), includes within its definition, any lump sum payment for termination pay and/or unused sick leave. According to the rules of statutory construction, (McKinneys Statutes, Sections 212 and 240), since lump sum payments for sick leave, or accumulated vacation credit, or any form of termination pay are specifically excluded from the term, "final average salary" in the best "one year bill" (Section 302, Subdivision 9 (d) of said law), then statutory construction of said overall section dictates that the term "final average salary" under the "3 year bill" encompasses the full amount of any lump sum payment for unused sick leave or termination pay. If the legislature had felt othrewise, it would have recited that said payments were excluded from the term "final average salary" under the "3 year bill" (Section 302, Subdivision 9 (b)) as it had done with respect to the "one year bill" (Section 302, Subdivision 9 (d)). As reinforcement of the above conclusion, the Legislature passed Section 431 of the Retirement and Social Security Law of the State of New York, which is the subject matter of this action, and which attempts to exclude from inclusion in the term "final average salary" any sums paid for termination pay or unused sick leave. Since said amounts are already excluded from Section 302, Subdivision 9 (d), Section 431 must be directed to altering Section 302, Subdivision 9 (b) by excluding from inclusion in the term "final average salary," such sums as termination pay and pay for unused sick leave. Thus, plaintiff reiterates that said termination pay and pay for unused sick leave are included under the "3 year

bill" within the term "final average salary" and have therefore become vested retirement benefits to members of the Nassau County Police Department who were employed prior to the effective date of Section 431, to wit, April 1, 1972, and any attempt at diminishing or impairing said vested retirement benefits is strictly prohibited by Article V, Section 7 of the New York State Constitution.

8. In view of the above, plaintiff respectfully submits to the Court that defendant's answer has failed to raise any material questions of fact and that there are only questions of law which should be resolved in favor of the plaintiff.

WHEREFORE, plaintiff respectfully asks for an order striking out the defendant's answer and directing the entry of summary judgment in his favor against the defendant for the relief demanded in the complaint.

/s/ DANIEL GREENWALD

Dated: Mineola, New York
May 11, 1972.

(Verified on May 11, 1972.)

Exhibit R

Memorandum Decision of Mr. Justice Casey

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

(Supreme Court Special Term, Albany County,

May 12, 1972)

(JUSTICE JOHN T. CASEY, Presiding)

Appearances:

RICHARD HARTMAN, ESQ.
Attorney for Plaintiff
300 Old Country Road
Mineola, New York 11501

HON. LOUIS J. LEFKOWITZ
Attorney General of the State of New York
Attorney for Defendant
The Capitol
Albany, New York

MEMORANDUM

CASEY, *J.*

Plaintiff, on behalf of himself and others similarly situated, has moved this court for an order granting him summary judgment.

Plaintiff has been employed as a policeman by the Nassau County Police Department since June 3, 1957. The Nassau County Police Department is a participating employer in the New York State Policemen's and Firemen's Retirement System. The defendant, The Comptroller of the State of New York, is the administrator of that system.

Plaintiff claims that under the collective bargaining agreement between Nassau County and the Nassau County Patrolmen's Benevolent Association when he retires he is entitled to cash payment for accumulated unused sick

time, accumulated unused vacation time, and termination pay. All of those payments, according to plaintiff, should be included in the computation of his final average salary under Subdivision 302 (k) (b) of the Retirement and Social Security Law. In 1971 the Legislature passed Section 431 of the Retirement and Social Security Law which became effective April 1, 1972. That section provides:

> §431. Salary base for computing retirement benefits. In any retirement or pension plan to which the state or municipality thereof contributes, the salary base for the computation of retirement benefits shall in no event include any of the following earned or received, on and after April first, nineteen hundred seventy-two:
>
> 1. lump sum payments for deferred compensation, sick leave, accumulated vacation or other credits for time not worked,
>
> 2. any form of termination pay,
>
> 3. any additional compensation paid in anticipation of retirement, or
>
> 4. that portion of compensation earned during any twelve months included in such salary base period which exceeds that of the preceding twelve months by more than twenty per centum.

Plaintiff argues that Section 431 is unconstitutional if given retroactive effect to individuals who were employed by the Nassau County Police Department prior to April 1, 1972. It is unconstitutional, plaintiff claims, because it impairs the retirement benefits of those individuals and thereby contravenes Article V, Section 7 of the New York State Constitution.

Exhibit "R"

Memorandum Decision of Mr. Justice Casey

The defendant concedes that Section 431 is unconstitutional insofar as it prohibits the inclusion of payments for unused vacation time in the computation of the "final average salary" for individuals employed prior to April 1, 1972. The Court of Appeals so held in *Kranker* v. *Levitt*, 30 N.Y. 2d 574. As to the prohibition against the use of payments for unused sick time and termination pay, however, the defendant argues that Section 431 is not unconstitutional.

In *Kranker* the Court of Appeals focused upon the practice of the Comptroller to include payments for unused vacation time in the computation of "final average salary". This practice, which had been in effect for a significant period of time prior to the enactment of Section 431, constituted a contract between the Comptroller and members of the Retirement System. Accordingly,the benefits conveyed by this contract, if extinguished by Section 431 constitute an impairment of the retirement benefits extended to employees who were members of the Retirement System prior to April 1, 1972 and thereby contravene Article V, Section 7 of the New York State Constitution.

As I read *Kranker*, a party must show a practice or course of action by the Comptroller which existed for a sufficient length of time so as to constitute a contract between the Comptroller and members of the Retirement System whereby the Comptroller included in his computation of "final average salary" the benefits he is now precluded from consideration under Section 431 of the Retirement and Social Security Law. The facts presented by the plaintiff fail to evidence a prior practice concerning either payments for termination pay or payments for unused sick leave.

Exhibit "R"

Memorandum Decision of Mr. Justice Casey

The request for summary judgment is denied except plaintiff is granted summary judgment as to the inclusion of vacation pay to the extent indicated in *Kranker* v. *Levitt*, supra.

Submit order.

Dated: Troy, New York
July 25, 1972.

Exhibit "R"

Order Appealed From

At a Special Term of the Supreme Court of the State of New York, held in and for the County of Albany, in the County Courthouse, Albany, New York, on the 12th day of May, 1972.

Present:

Hon. John T. Casey,

Justice.

Upon reading and filing the summons and complaint herein, dated the 14th day of February, 1972, demanding judgment declaring that section 431 of the Retirement and Social Security Law is unconstitutional and invalid and restraining the enforcement thereof, the answer of the defendant dated March 7, 1972, plaintiff's notice of motion for summary judgment and the affidavit of Daniel Greenwald, sworn to on March 20, 1972, in support thereof, the affidavit of John S. Muahs, sworn to on May 4, 1972, in opposition thereto,the reply affidavit of Daniel Greenwald, sworn to on May 11, 1972, and the motion having come on to be heard and after hearing Richard Hartman, Esq., attorney for plaintiff, in support thereof, and Louis J. Lefkowitz, Attorney General of the State of New York, (John Q. Driscoll, Esq., of counsel) attorney for defendant, in opposition thereto, and after due deliberation a memorandum decision having been issued,

Now on motion of Louis J. Lefkowitz, Attorney General of the State of New York, it is hereby

Ordered, adjudged and decreed that plaintiff's motion for summary judgment be and the same hereby is denied, except as to the inclusion of the cash value of accrued but unused vacation credits, up to 30 days, in the computation of final average salary, to which extent it is granted, and it is further

Exhibit "2"
Order Appealed From

ADJUDGED AND DECREED that the provisions of Retirement and Social Security Law §431 are not unconstitutional as an impairment or diminution of public retirement benefits insofar as they relate to the exclusion of lump sum payments of accrued sick leave credits or any form of termination pay in the computation of final average salary.

Dated: Troy, New York

August 11, 1972

Enter:

/s/ JOHN T. CASEY
Justice of the Supreme Court

Exhibit S
Notice of Appeal

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

DANIEL GREENWALD, individually and as Representative of the Nassau County Patrolmen's Benevolent Association,

Plaintiff,

— against —

ARTHUR LEVITT, Comptroller of the State of New York and Administrator of the New York State Policemen's and Firemen's Retirement System,

Defendant.

SIRS:

PLEASE TAKE NOTICE that the above named Plaintiff, Daniel Greenwald, individually and as Representative of the Nassau County Patrolmen's Benevolent Association, hereby appeals to the Appellate Division of the New York Supreme Court, in and for the Third Department, from an Order entered in the above entitled action in favor of the above named Defendant, Arthur Levitt, Comptroller of the State of New York and Administrator of the New York State Policemen's and Firemen's Retirement System, entered in the Office of the Clerk of the County of Albany, on the 16th day of August, 1972, and this appeal is taken from each and every part of said Order as well as the whole thereof.

Dated: Mineola, New York.
August 23, 1972

Yours, Etc.,

RICHARD HARTMAN
Attorney for Plaintiff
Office & P.O. Address
300 Old Country Road
Mineola, New York 11501

Exhibit "S"

Notice of Appeal

To:

County Clerk
County of Albany
Albany, New York

Hon. Louis J. Lefkowitz
Attorney General of the State of New York
Attorney for Defendant

The Capitol
Albany, New York

Exhibit T

Order Appealed From.

At a Term of the Appellate Division of the Supreme Court of the State of New York, held in and for the Third Judicial Department at the Justice Building in the City of Albany, New York, commencing on the 9th day of April, 1973.

Present:

Hon. J. Clarence Herlihy,
Presiding Justice.
Hon. Louis M. Greenblott,
Hon. Lawrence H. Cooke,
Hon. T. Paul Kane,
Hon. Robert G. Main,
Associate Justices.

In the Matter

of

Daniel Greenwald, Individually and as Representative of the Nassau County Patrolmen's Benevolent Association,

Appellant,

against

Arthur Levitt, as Comptroller of the State of New York and Administrator of the New York State Policemen's and Firemen's Retirement System,

Respondent.

Plaintiff Daniel Greenwald, individually and as representative of the Nassau County Patrolmen's Benevolent Association, having appealed from an order of the Supreme Court of Albany County, entered on the 16th

Exhibit "T"

Order Appealed From

day of August, 1972, in the office of the Clerk of the County of Albany, denying in part the motion for summary judgment and declaring that the provisions of the Retirement and Social Security Law, §431, are not unconstitutional, and said appeal having been presented during the above-stated Term of this Court and having been argued by Richard Hartman, Esq., of counsel for appellant, and by John Q. Driscoll, Esq., of counsel for the respondent, and after due deliberation, the Court having rendered a decision on the 31st day of May, 1973 (Opinion per Greenblott, J.), it is hereby

ORDERED that the order appealed from be and the same is hereby modified, on the law, so as to declare so much of section 431 of the Retirement and Social Security Law as prohibits the inclusion of termination pay in final average salary unconstitutional, and, as so modified, affirmed, without costs.

Enter:

/s/ JOHN J. O'BRIEN
Clerk

Dated and Entered: June 7, 1973

A True Copy
JOHN J. O'BRIEN
Clerk

Exhibit U

Notice of Appeal to the Court of Appeals.

COURT OF APPEALS,

STATE OF NEW YORK.

IN THE MATTER

of

The Application of DANIEL GREENWALD, Individually and as Representative of the Nassau County Patrolmen's Benevolent Association,

Appellant,

against

ARTHUR LEVITT, as Comptroller of the State of New York and Administrator of the New York State Policemen's and Firemen's Retirement System,

Respondent.

SIRS:

Please Take Notice that petitioner above named herein, appeals to the Court of Appeals of the State of New York from each and every part of the Order of the Appellate Division, Third Department, as well as from the whole thereof, made in the above entitled proceeding and entered in the office of the Clerk of said Court on

Exhibit "U"

Notice of Appeal to the Court of Appeals

the 7th day of June 1973, said order modifying the lower court's determination.

Dated: Mineola, New York
July 2, 1973

Yours, etc.,

RICHARD HARTMAN
Attorney for Petitioner
300 Old Country Road
Mineola, New York 11501
(516) 742-9000

To:

Louis J. Lefkowitz
Attorney for Respondent
Attorney General for the State of New York
Capitol, Albany, New York

Exhibit V

Order to Show Cause

At a Special Term of the Supreme Court of the State of New York held in and for the County of Albany, in the County Courthouse, Albany, New York on the 10th day of April, 1972.

(Same Title)

Upon the annexed Petition of Joseph P. Weber, duly sworn to the 9 day of April, 1972, and upon all of the proceedings heretofore had herein, and upon motion of Richard Hartman, attorney for the Petitioner, it is

ORDERED, that the Respondent or his attorney show cause before this Court at a Special Term, Part I thereof, to be held at the County Courthouse, City of Albany, New York, on the 14th day of April, 1972, at 9:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard why an order should not be made and entered herein directing the Respondent to refrain from recomputing Petitioner's final average salary with regards to redetermining his retirement allowance from the New York State Policemen's and Firemen's Retirement System; and it is further

ORDERED, that a service of a copy of this Order to Show Cause and Petition upon which it is based, upon Respondents on or before the 10th day of April, 1972, be deemed good and sufficient service upon Respondents and sufficient to make the stay herein provided for effective until the further order of this Court.

Dated: Albany, New York

April 10, 1972.

/s/ EDWARD S. CONWAY
Justice of the Supreme Court.

Exhibit "V"

Petition

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

(Same Title)

JOSEPH P. WEBER, Petitioner herein, by his attorney, RICHARD HARTMAN, complaining of the Respondent, respectfully alleges:

1. Petitioner was a member of the Police Department County of Nassau, having been appointed to said position on the 15th day of February, 1950 and having retired on the 23rd day of February, 1970.

2. That at all times hereinafter mentioned, Petitioner by virtue of the fact that he was a policeman employed by the Nassau County Police Department, a participating employer in the New York State Policemen's and Firemen's Retirement System, was a member of the New York State Policemen's and Firemen's Retirement System and entitled to all the benefits thereunder.

3. That at all times hereinafter mentioned, Respondent, Arthur Levitt, is the duly elected Comptroller of the State of New York and the person responsible by law for the Administration of the New York State Policemen's and Firemen's Retirement System.

4. That on the 16th day of March, 1970, a contract between the Nassau County Patrolmen's Benevolent Association and the County of Nassau was duly signed by County Executive Eugene H. Nickerson on behalf of the County of Nassau after having been approved by the Nassau County Board of Supervisors. (a copy of said contract is attached hereto and labeled Exhibit "A")

5. That the Nassau County Patrolmen's Benevolent Association is the certified bargaining agent for all members of the Nassau County Police Department from the rank of Patrolman to Detective Captain.

6. That said contract was made pursuant to the Taylor Law after several months of collective bargaining and was made retroactive so as to affect all members of the bargaining unit who were employed by the Nassau County Police Department on or after January 1, 1970.

7. That the contract benefits resulting from said collective bargaining under the Taylor Law were legal and binding and any attempt by the Respondent to impair said contract benefits via administrative ruling is prohibited by Article V, Section 7 of the New York State Constitution and Article 1, Section 10 of the United States Constitution.

8. That Petitioner was a patrolman in good standing in the Nassau County Police Department until the date of his retirement on February 23, 1970 and entitled to all the benefits contained within the attached contract.

9. That pursuant to Paragraphs 7 K of the 1970 Agreement, Petitioner was entitled upon retirement to termination pay equivalent to three (3) days pay a year for all years served with the Nassau County Police Department prior to his retirement.

10. That Petitioner served 20 years with the Nassau County Police Department and was therefore paid by the County of Nassau, a lump sum cash termination payment calculated by multiplying the number of years served by three days a year.

11. That Section 302 Subdivision 9 (b) of the New York State Retirement and Social Security Law defines the "final average salary" as:

> "In the case of a member having credit for three years or more of member service, such term shall mean his highest average annual compensation earned during any three consecutive years of mem-

ber service for which he is credited, provided that a member by written request filed with the comptroller prior to the effective date of retirement and in form satisfactory to the comptroller, may select any other period of three consecutive years of member service for which he is credited."

12. That Petitioner earned and was paid termination pay in his final three years and such lump sum payment is included in the amount from which the final average salary is computed.

13. That Petitioner was notified and his retirement allowance reflected in the checks that he has received prior to March, 1972 that his final average salary was computed to include the full amount of termination pay paid to him by the County of Nassau upon retirement.

14. That as of March 30, 1972, Petitioner was advised by letter from the Respondent that his retirement allowance was being recalculated due to an "error" in computing Petitioner's "final average salary". (a copy of said letter is attached hereto and labeled Exhibit "B")

15. That the recalculation by Respondent of Petitioner's retirement allowance results in having the Petitioner receive approximately $35.00 per month less than what he was receiving prior to said recalculation.

16. That upon information and belief, Respondent's recalculation of Petitioner's retirement allowance is based upon Respondent's failure to properly interpret the definition of the term "final average salary" as set forth in Section 302, Subdivision 9 (b) of the New York State Retirement and Social Security law, to wit, to include within the term "final average salary" the total sum earned and paid Petitioner at the time of his retirement for termination pay.

Exhibit "V"

Petition

17. That Respondent's actions to recompute Petitioner's "final average salary" exclusive of the full amount of termination pay paid to Petitioner upon retirement has no basis in law and is arbitrary, capricious and an abuse of discretion. Additionally, such action by Respondent acts to diminish and/or impair Petitioner's benefits under the New York State Policemen's and Firemen's Retirement System in direct violation of Article 5 Section 7 of the New York State Constitution.

18. That Petitioner has no other adequate remedy at law.

19. That no previous application for the relief sought herein has been made to any Court or Judge.

WHEREFORE, Petitioner demands judgment against the Respondent directing the Respondent to refrain from recomputing Petitioner's final average salary with regards to redetermining his retirement allowance from the New York State Policemen's and Firemen's Retirement System, and for such other and further relief as to this Court may seem just and proper.

Dated: Mineola, New York

April 9, 1972

/s/JOSEPH P. WEBER

(Verified on April 9, 1972.)

Exhibit "V"

EXHIBIT A

TO PETITION

Preamble:

The County of Nassau is engaged in furnishing essential public services vital to the health, safety and welfare of its residents. This agreement seeks to assure the orderly and uninterrupted operations of the government by maintaining a harmonious relationship between the government and a unit of its employees.

Therefore, the County of Nassau and The Patrolmen's Benevolent Association of the Police Department of the County of Nassau, Inc., in consideration of the mutual promises and obligations herein assumed, have entered into this agreement this day of , 1970.

1. *Definitions.* For purposes of this agreement, the following definitions shall apply:

a. "Association" means The Patrolmen's Benevolent Association of the Police Department of the County of Nassau, Inc.

b. "Budget Submission Date" means the second Monday in November.

c. "County" means the County of Nassau.

d. "Detective" means an employee who is a detective, detective sergeant, detective lieutenant or a detective captain.

e. "Disciplinary Proceeding" means a legal proceeding charging an infraction or violation of the law or of departmental rules or regulations commencing with the service of charges and specifications upon the employee and culminating in the conclusion of the departmental trial.

f. "Employee" means an individual who is a member of the negotiating unit.

g. "Grievance" means any dispute between the Association or employee and the County with respect only to the meaning or interpretation of a provision of this agreement. It shall not include disciplinary proceedings or any other matters which are reviewable under administrative procedures established by law or the rules of the Nassau County Civil Service Commission.

h. "Negotiating Unit" means all employees included in the certification of representative and order to negotiate issued by PERB on February 13, 1968, which certificate is made part hereof and attached as Schedule "A".

i. "PERB" means the Nassau County Public Employment Relations Board.

j. "President" means the President of The Patrolmen's Benevolent Association of The Police Department of the County of Nassau, Inc.

1. *The Association.* The Association has been duly certified as the negotiation representative of the negotiating unit by an order of PERB dated February 13, 1968. The County recognizes the Association as the exclusive and unchallenged negotiating representative for collective negotiation with respect to rates of pay, salaries, hours and other terms and conditions of employment for all of the employees in the negotiating unit for the period of this agreement.

3. *The County.* Except as limited by this agreement, The County reserves the right to determine the standards of service to be offered by its various agencies; to set the standards of selection for employment; to direct its employees; to regulate work schedules, to take disciplinary action; to relieve its employees from duty because of lack of work or for other legitimate reasons; to maintain the

efficiency of governmental operations; to determine the methods, means and personnel by which governmental operations are to be conducted; to determine the content of job classification; to take all necessary actions to carry out its mission in emergencies; and to exercise complete control and discretion over its organization and the technology of performing its work.

4. *Association Activities.* Both parties mutually agree that:

a. There shall be no interference with the right of employees to become or continue as members of the Association.

b. There shall be no discrimination, restraint or coercion against any employee because of membership in or lawful activities on behalf of the Association.

c. There shall be no intimidation or coercion of employees into joining the Association or continuing their membership therein.

d. There shall be no Association activity on County time except as set forth herein.

e. There shall be no strike, or other concerted stoppage of work or slowdown by any employee; nor shall any officer or representative of the Association authorize, instigate, aid or condone any such activity.

f. The President shall be permitted access to County property at reasonable times when necessary to transact legitimate Association business pertaining to the administration of this agreement after notice to the Commissioner of Police or his designated representative.

g. County bulletin boards may be used to post Association notices after being approved, in writing, by the

Commissioner of Police or his designated representative. Notices from the Association shall be signed by the President, Vice-President, Secretary or Treasurer. All notices posted by the Association are the responsibility of the officials of the Association. Unsigned notices may not be posted. Defacing, adding to or writing over any general notice or posting unofficial bulletins or notices or any that are offensive, shall be prohibited. The following notices, however, do not need approval by the Commissioner of Police or his designated representative.

(1) Notices of Association recreational or social affairs.

(2) Notices of Association elections and meetings.

(3) Notices of Association appointments and results of Association elections.

All notices shall be promptly removed after they have served their purpose. No provision of this agreement shall be construed to permit the posting of any political, advertising, or controversial matter on bulletin boards or elsewhere upon County property. Notices shall not exceed 8½" x11" in size and shall be posted in a manner so as not to obstruct other notices.

h. The County shall deduct from the bi-weekly wages of each employee who has authorized the same, Association dues, assessments, initiation fees, group life insurance premiums, group accident and health insurance premiums of the Association and forward the total amount of such deductions forthwith to the Association. Such payroll deduction

authorizations shall be in writing, signed by the employee and in the form generally in use by the Association. The amounts for such deductions shall become effective only upon filing with the County Comptroller a certified copy of the resolution of the Association or other document authorizing such amount. Dues shall be a unified amount for all employees. Such payroll deduction authorizations shall take effect fifteen (15) days after receipt thereof by the County Comptroller. The County shall not be liable to the Association by reason of the requirements of this subdivision for the remittance or payment of any sum other than that constituting the deductions agreed to be made from the employee's wages.

i. The County will not permit any other employee organization to hold meetings on County property at any time with reference to employees in the negotiating unit. This shall not be construed to prohibit any other meeting of employee organizations with reference to any subject not within the scope of this agreement.

restraint, discrimination or reprisal.

5. *Grievance Procedures.* a. Every employee shall have the right to present his grievances in accordance with the procedures described herein, with or without a representative of the Association, free from interference, coercion,

Step. 1. An employee who feels that he has been aggrieved may orally present his grievance to his Commanding Officer who shall carefully consider the matter; and within three (3) days thereafter make a determination and advise the employee of the decision.

Step 2. If the grievance is not satisfactorily adjusted in Step 1, an employee may, not later than ten (10) days after notification of the decision provided for in Step 1, submit the matter in writing to either the Chief of Detec-

tives, Chief of District or Chief of Headquarters, based on his command affiliation. The Chief having command jurisdiction shall give the employee, and if the employee desires, a representative of one of the three Department line organizations, an opportunity to fully discuss the matter. The Chief having command jurisdiction shall, within seven (7) days after the matter has been fully presented, carefully consider the matter, make a determination and notify both the employee and the employee's Commanding Officer of his decision.

Step 3. If the grievance is not satisfactorily adjusted in Step 2, an employee may present the matter, in writing, to the Commissioner of Police for determination. The employee shall do so, within ten (10) days after notification of the decision provided for in Step 2 by requesting, in writing, a personal interview or, if he so desires, requesting that a representative of one of the three Departmental line organizations be permitted to present the matter on his behalf. The Commissioner of Police shall make his determination within ten (10) days after the matter is presented to him and after appropriate consultation with any or all parties to the grievance. All interviews or determination may be made by a designated representative of the Commissioner of Police.

Step 4. An employee or the President may appeal the decision made under Step 3 to the Nassau County Grievance Board within five (5) days after receipt of such decision. The procedure for the processing of the grievance before the Grievance Board shall be as set forth by the rules and regulations of such Board. However, before the parties proceed to this fourth step involving the Nassau County Grievance Board, if the President and the Commissioner of Police mutually agree, then the parties may call upon the Commissioner of Labor to use his good offices to attempt to settle the grievance.

b. For the purpose of grievance procedures:

(1) Failure at any step of the procedure provided herein to communicate a decision on a grievance within the specified time limits shall permit the employee to proceed to the next step.

(2) Failure at any step of this procedure to appeal a grievance to the next step within the specified time limits shall be deemed to be a waiver of the right to appeal.

(3) The term "day" means working day.

(4) The Association may submit a grievance, in writing, providing it does not merely affect an individual with Step 3 as the initial step.

c. Conferences and hearings held under the procedure provided herein shall be conducted at a time and place which will afford a fair and reasonable opportunity for all persons entitled to be present at such conference or hearing. When such conference or hearing is held during working hours, all individuals necessary for the conference or hearing shall be excused without loss of pay for that purpose.

6. *Disciplinary Procedures.* a. Notwithstanding the provisions of any other section of this agreement, disciplinary procedures shall be the same as are presently in effect and pursuant to law.

b. The employee under internal investigation shall have the right to have present during the period of interrogation a duly designated representative of the Association who has been previously certified by the Association on a list submitted to the Commissioner of Police and is a member of the negotiating unit which list shall provide for the designation on precinct or unit level. The employee shall be given a reasonable opportunity to notify such duly

designated representative but the period of interrogation shall not be delayed for more than one hour because such duly designated representative is unable to be present. This right to such a duly designated representative during the period of interrogation shall not apply to internal investigations of complaints of minor violations of the Rules and Regulations of the Police Department of the County, such as absence from post, failure to signal, failure to make entries, loss of equipment, etc. Such duly designated representative, while having the right to be present during the period of interrogation, shall not be permitted to interfere with or interrupt the interrogation. The representative, however, shall have the right to confer with and advise the employee only before and after interrogation.

7. *Employee Benefits*

a. Salaries.

1. The 1969 salary schedule shall be increased by six per cent (6%) effective January 1, 1970, and Detective Sergeants shall receive an additional Four Hundred ($400.00) Dollars. The 1970 salary schedule shall be as follows, provided, however, on January 1, 1971, all such salaries shall be increased by one Hundred ($100.00) Dollars.

Patrolman	*Salary*	*Period of Service*
1	$ 8,199	Commenced or or after 1/1/70
2	8,881	One year of service or more
3	9,686	Two years of service or more
4	10,507	Three years of service or more
5	11,073	Four years of service or more
Detective		
1	11,688	Less than one year of service
2	12,139	One year of service or more
3	12,657	Two years of service or more
Sergeant	12,739	Any period of service
Detective Sergeant	13,523	Any period of service
Lieutenant	14,441	Any period of service

Det. Lieutenant	15,060	Any period of service
Captain	15,864	Any period of service
Detective Captain	16,567	Any period of service

2. Annual increments for employees, where appropriate, shall be given on the following January 1st of each calendar year with a full year's service being credited for the calendar year of appointment. All payments of salary shall be based on a 261 day work year.

3. Notwithstanding any other provision of this agreement, any employee who separates from service shall be paid all accrued cash benefits provided in this agreement including salary, overtime, holiday pay, night differential, recall payments, lump sum payment, standby, termination pay, unused vacation time, and clothing allowance at the time of separation.

b. *Longevity.* In addition to the salary provided in subdivision a of this section an employee shall be entitled to a longevity payment of Three Hundred ($300.00) Dollars after eight (8) years of completed service, Three Hundred Fifty ($350.00) Dollars more after ten (10) years of completed service, and Three Hundred Fifty ($350.00) Dollars more after fifteen (15) years of completed service, for a total of One Thousand ($1,000.00) Dollars after such fifteen (15) years. Years of completed service shall only include time served as a member of the Police Force of the County on a full time pay status or while on a military leave of absence pursuant to Section 243 of the Military Law of New York. Longevity payments shall become effective on the first day of the next bi weekly pay period following the employee's anniversary date of such completed service.

For employees who have completed eight (8) years of service prior to January 1, 1970, for purposes of longevity payments, the anniversary date shall be January 1, 1970. For employees who have previously received longevity payments in amounts less than provided herein, the addi-

tional sum provided herein shall become effective on January 1, 1970

c. Lump Sum Payments. Employees, who are employees of the police force on December 31, 1970, shall receive, in addition to any compensation provided herein, the sum of One Hundred ($100.00) Dollars if he was such an employee prior to July 1, 1970, or Fifty ($50.00) Dollars if he was such an employee only at any time on or after July 1, 1970, which amount shall be paid in the month of January 1971. For employees who separate from service during 1970, such payment shall be pro-rated on a like manner.

d. Basic Work Week And Tour Of Duty.

1. Except as provided in this subdivision, the basic workweek for employees shall be not more than forty (40) hours and the basic tour of duty shall be eight (8) hours which includes forty-five (45) minutes of paid meal time a day.

2. Detective shall have the basic workweek provided in Schedule B which may include a tour of duty of twelve (12) hours.

3. Employees will be excused for a forty-five (45) minute meal period during each tour of duty.

4. Employees who are receiving training from the Recruit Training Bureau shall have a basic workweek of forty-eight (48) hours, consisting of tours of duty of eight (8) hours.

5. Employees who are detailed on assignments concerning out-of-state renditions, extraditions, or investigations, shall receive credit for eight (8) hours for each full day on such assignment regardless of the hours actually worked if

such assignment extends beyond one calendar day; provided, however, if such assignment is completed in one calendar day, all hours actually worked shall be credited to the employee.

6. Employees participating in voluntary activities sanctioned by the Police Department such as softball, band, pistol competition, bowling, etc. shall not receive credit as time worked for such activities except when granted by the Commissioner of Police.

7. Effective April 1, 1970, all employees in the uniform police force, who work a rotating schedule shall have their schedule rotated on a five (5) day and seventy two (72) hour basis. A "rotating schedule" is a schedule which involves the assignment to a particular detail which requires on-duty coverage on a full twenty-four (24) hour basis.

8. Court appearances, uniform fittings and medical examinations of employees shall be credited as actual time worked by an employee in his basic workweek and tour of duty.

9. Employees attending a conference or convention of municipal officers or employees or a school or seminar for the betterment of municipal government, whether the same be official or unofficial, when authorized in writing by the Commissioner of Police, shall receive credit for eight (8) hours of each full day on such assignment regardless of the hours worked.

c. Overtime.

1. For employees, except detectives, overtime shall be paid by the following rules: it shall be paid either as paid overtime compensation or compensatory time. Paid overtime compensation shall be at the rate of the employee's base annual salary divided by 1392 for each hour of over-

time worked. (1392 is time and one-half based on an eight (8) hour day and 261 day work year). Compensatory time shall be computed at the rate of time and one-half. The employees shall have the discretion as to whether overtime shall be paid overtime compensation or compensatory time and shall exercise such discretion either immediately before working such overtime or immediately after completing the working of such overtime and notify his Commanding Officer of his decision. An employee may accumulate no more than forty (40) hours of overtime payable as sixty (60) hours of compensatory time and shall receive only paid overtime for all hours in excess of such forty (40) hours.

2. Detectives shall receive overtime compensation on either a paid overtime compensation or compensatory time basis, at the option of the detective. The detective must exercise his option either immediately prior to or immediately after working overtime and notify his Commanding Officer of his decision. Paid overtime compensation shall be at the rate of his base annual salary divided by 2088 for each hour of overtime worked. Compensatory time shall be granted at straight time. A detective may receive no more than forty (40) hours of overtime payable as paid overtime compensation in a calendar year and shall only receive compensatory time on a straight time basis for all hours in excess of each forty (40) hours.

3. The County has the right to order an employee to perform overtime.

4. An employee attending his own disciplinary proceeding, award or promotional ceremonies shall not receive any overtime because of hours directly or indirectly involved therein.

5. An employee reporting back to duty after being on sick leave shall receive no overtime because of hours directly or indirectly involved therein.

Exhibit "V"

Exhibit A — Agreement

6. An employee ordered to report for a physical examination while he is on extended sick leave for more than thirty (30) days shall receive no credit for time worked or overtime for any hours directly or indirectly involved therein.

7. Any compensation payable to employees, except detectives, as the first forty (40) overtime hours under this subdivision shall be paid in the month of January 1971.

8. Compensatory time shall be granted in the calendar year it is earned except that unused overtime up to a total of forty (40) hours of overtime payable as sixty (60) hours of compensatory time may be carried over and granted in the following year, for all employees except detectives who have no limit.

9. For bookkeeping purposes, compensatory time shall be recorded on a first-in, first-out basis. The employee shall be able to split his choice of recording earned overtime between paid overtime compensation and compensatory time.

10. Compensatory time shall be granted only when the employee and his Commanding Officer agree and only in eight (8) hour units.

11. An employee's workweek or chart shall not be altered during that workweek for the sole purpose of avoiding overtime compensation.

12. For overtime earned between January 1, 1970 and the signing of this agreement by the Association, the employee may change his previous choice of either compensatory time or paid overtime compensation. This change, if desired by the employee, shall be made prior to May 1, 1970.

f. Holiday Pay.

1. Employees shall receive holiday pay as provided in Ordinance No. 95/1964, which shall be amended to add one

additional holiday, Election Day. In no event shall there be less than eleven (11) holidays in a calendar year.

2. For an employee who actually works on a day observed as a holiday and is his regularly scheduled work day, his compensation shall include, in addition to his regular day's pay and holiday pay provided in subsection 1 for all hours worked during a tour of duty compensation payable at the rate of his base annual salary divided by 4176 for each hour worked. For all hours worked in excess of his tour of duty such hours shall be payable as overtime. The extra actual work compensation payable under this subsection shall be paid in the month of January 1971.

3. For an employee who has a regularly scheduled work day on a day observed as a holiday and is ordered not to work on such day, he shall receive the same benefits as provided in subsection 2.

4. For an employee who does not have a regularly scheduled work day on a day observed as a holiday, but actually works on such a day, his compensation shall include, in addition to a regular day's pay and holiday day provided in subsection 1, for all hours worked during a tour of duty compensation pay at the same basis as overtime compensation for all employees, except detectives, who shall receive paid overtime compensation at the rate paid to all other employees and shall not in any way affect the limitation of paid overtime compensation provided in section 7 (c) (2) of this agreement.

g. Special Days.

1. Special events shall be payable pursuant to Ordinance No. 158-1964.

2. When the County Executive, or in his absence, his designated representative, declares that an emergency exists because adverse weather has impaired the use of

available transportation facilities or for other reasons that affect the health and welfare of officers or employees of the County and directs either not to report to work or to leave work, such absence shall be deemed an absence with pay as provided in Ordinance No. 34-1969, as amended. Employees who have reported to work prior to such County Executive's declaration of an emergency or actually work thereafter shall have such time worked payable at the option of the Commissioner of Police on either a cash basis as required for overtime or compensatory time at the rate of one and one-half times (1½) such time worked.

h. Recall.

1. An employee recalled to work after he has finished his tour of duty and is placed on duty shall receive a minimum of four (4) hours credited as time worked. An employee recalled but not placed on duty shall be credited with two (2) hours as time worked.

2. For employees, except detectives, any time credited on a recall shall be compensated on the same basis as overtime. Detectives shall be compensated at time and one-half on a compensatory time basis.

3. Recall is a communication to an employee while off duty directing him to proceed immediately to engage in work or to report for such work at a designated time.

4. The County shall provide comprehensive liability coverage for an employee who is recalled covering both one-half hour before the time he is due to report for recall and one-half hour after the time he is relieved from duty on the recall. This section shall not be construed to relieve the County from its duty to provide comprehensive liability coverage for employees regularly on duty in their capacity as police officers.

Exhibit "V"

Exhibit A — Agreement

i. Standby.

An employee who is ordered to be on standby shall be paid at the rate of one hour for every eight (8) hours he actually remains on standby. There shall be no voluntary standby. The real rate shall be computed by dividing the base annual salary by 2088. Compensation for standby time shall be pro-rated. For purposes of this subsection, standby is time that an employee is not actually on duty but is continuously available to report to duty within one hour of receiving notification and the employee is required to insure his availability by furnishing to his Commanding Officer a place where he may be so notified. For purposes of standby no employee shall be required to stay at home.

j. Vacation, Sick Leave and Leaves of Absences.

1. Except as provided herein, vacations, sick leave and leaves of absences shall be a presently provided in the Rules and Regulations of the Police Department of the County.

2. For employees in service prior to January 1st, in a calendar year, two (2) days of personal leave shall be granted for each calendar year. For employees whose initial date of service is after January 1st, in a calendar year, two (2) days of personal leave shall be granted for the calendar year. For employees whose initial date of employment is on July 1st of any year, one day of personal leave shall be granted for the calendar year. Personal leave may not be carried over from one year to the next and shall be applied for on Police Department Form No. 198.

3. Vacation time shall not be lost because of an employee's illness, providing the illness does not continue for more than one continuous year. Such vacation time may be carried over and taken during the following calendar year. However, a member on vacation may not sign on sick leave until the termination of his vacation period.

k. Termination Pay.

Upon separation from the service, after twenty (20) years, for any reason, other than cause, or upon the death in service of any employee, such employee or his legal representative, shall be entitled to cash payment for accumulated terminal leave computed on an entitlement basis of three (3) days for each year of completed service. Year of completed service shall only include time served as a member of the Police Force of the County on a full pay status or while on a Military Leave of Absence pursuant to Section 243 of the Military Law of New York State.

l. Health Insurance.

1. The County shall pay the full contribution of all health insurance plans authorized pursuant to Article XI of the Civil Service Law during the 1970 calendar year.

2. The County shall select a dental plan pursuant to Section 92-a of the General Municipal Law on or before September 1, 1970. The selected plan shall take effect January 1, 1971. The County shall contribute One Hundred ($100.00) Dollars a year, pro-rated equally when premiums are due towards the premium of each employee who elects the plan.

m. Night Differential.

Employees shall receive an additional differential compensation in accordance with the following rules and Department of Labor directive attached hereto as Schedule c:

Effective January 1, 1970.

a. An employee, at least half of whose shift is between 4:00 p.m. and 8:00 a.m., shall receive additional differential compensation of fifteen (15) cents per hour for each hour

actually worked, regardless of whether such hours are between 4:00 p.m. and 8:00 a.m.

b. In lieu of hours actually worked, employees who are on authorized leave, such as sick leave, personal leave, vacation time, compensation time or a paid holiday, shall likewise receive the additional differential compensation provided for herein, if such employee, by reason of his work schedule would otherwise have worked during such hours for which the said additional differential compensation would be paid in pursuance of this subdivision.

c. Any compensation payable under this subdivision shall be paid during the month of January 1971.

n. Retirement Benefit.

The County agrees to support state legislation permitting policemen to retire with a final average salary computed on the basis of one year's service in place of the present basis of three years' service.

o. Clothing Allowance.

All uniforms necessary for an employee to perform his duty as a uniformed officer shall be furnished by the County. In addition, any employee assigned to perform duty in plain clothes by order of the Commissioner of Police for a continuous period of not less than six (6) months, will receive additional compensation in lieu of clothing pro-rated bi-weekly on a basis of Three Hundred ($300.00) Dollars per calendar year.

8. Impasse Procedures.

The parties hereto wish to avail themselves of the right to agree to their own procedures as permitted under the law and, therefore, mutually agree upon the impasse procedures set forth herein.

Exhibit "V"

Exhibit A — Agreement

The parties agree to share the cost of any mediators or fact-finders chosen to aid in the resolving of any impasse that may arise in future negotiations.

An impasse shall not be deemed to exist because the parties fail to achieve an agreement sixty (60) days prior to the Budget Submission Date. The parties hereby agree to continue with the negotiations into the sixty (60) days period before the Budget Submission Date. If one of the parties believes an impasse has occurred, it shall request the other to join in choosing a mediator by mutual agreement. If the parties cannot agree on a mediator within two (2) days after such request, then, upon notification by either party, the PERB shall submit to the parties a list of seven (7) persons who are residents of the County. The parties shall determine, by the tossing of a coin, who shall have the right to remove the first name from such list and the parties shall alternately remove names from such list until one name is left. This remaining person shall be the mediator.

If the mediator does not effect a settlement within ten (10 days of his appointment, the dispute shall be submitted to a fact-finding board of three (3) members. One (1) member shall be chosen by the County, one (1) member by the Association and one (1) member by mutual agreement of the first two (2) fact-findinders chosen. If the first two (2) fact-finders cannot mutually agree to the third fact-finder within three (3) days after their selection,then the PERB shall submit to these two (2) members a list of seven (7) qualified persons who are County residents, and the two (2) members shall, by the toss of a coin, determine who shall remove the first name from such list; and the parties shall alternately remove names from such list until one (1) name is left. Such last remaining named person shall be the third member and Chairman of the Fact-Finding Board.

If the dispute is not resolved at least fifteen (15) days prior to the Budget Submission Date, the Fact-Finding Board, acting by a majority of its members, shall immediately transmit its findings of fact and recommendations for resolving the dispute to the County Executive and to the President of the PBA and shall simultaneously make public such findings and recommendations.

If the dispute reaches a point where findings of fact and recommendations are made public by the Fact-Finding Board established pursuant to these procedures and the impasse continues, the PERB shall take whatever steps it deems appropriate to resolve the dispute, including the making of recommendations after giving due consideration to the findings of fact and recommendations of such Fact-Finding Board, but no further fact-finding board shall be appointed.

In the event that either party does not accept in whole or in part the recommendations of the Fact-Finding Board, the County Executive shall, within five (5) days after receipt of the findings of fact and recommendations of the Fact-Finding Board, submit to the County Board of Supervisors a copy of the findings of fact and recommendations of the Fact-Finding Board together with his recommendations for settling the dispute, and the Association may submit to such legislative body its recommendations for settling the dispute.

9. Employee Representatives.

a. It is hereby to be in the best interests of the County that the President be permitted to perform his duties as an employee for the basic workweek in his capacity as President and as a member of the negotiating unit, and that the performance in this capacity shall be deemed actual hours worked on duty. An employee who is chief

representative of supervisory officers (rank of Sergeant or above) as certified by the President to the Commissioner of Police, shall be credited with four (4) hours weekly towards his basic workweek for the performance in his capacity as such chief representative. An employee who is chief representative of detectives (Detective rank only) as certified by the President to the Commissioner of Police, shall be credited with four (4) hours weekly towards his basic workweek for the performance in his capacity as such chief representative. Chief representative shall be assigned a day shift insofar as practicable.

b. A maximum of ten (10) days leave of absence shall be granted to the designated representative of the Association for legislative work in behalf of the Association and if there is more than One (1) representative the ten (10) days leave time may be apportioned between them but in no event shall the total of such leave time exceed the ten (10) day maximum. Application for Legislative Leave shall be made pursuant to the pertinent provisions of the Rules and Regulations controlling Leave of Absence on police department form No. 198.

10. PERB Ordinance.

As required by Section 7-A Ordinance No. 228-1967, "It is agreed by and between the parties that any provision of this agreement requiring Legislative action to permit its recommendation by amendment of law or by providing the additional funds therefor, shall not become effective until the appropriate Legislative body has given approval."

11. Contract Renewal.

This agreement shall be effective from January 1, 1970, and shall continue in full force and effect until and including December 31, 1970.

Exhibit "V"

Exhibit A — Agreement

County of Nassau

County Executive

The Patrolmen's Benevolent Association of the Police Department of the County of Nassau, Inc.

President

Form approved:

Chief Deputy County Attorney

State of New York
County of Nassau ss.:

On this day of ,1970, before me personally appeared Eugene H. Nickerson, County Executive of the County of Nassau, the corporation described in and who executed the forgoing instrument, to me known and known to me to be such County Executive, and he being by me duly sworn, did depose and say: That he is the County Executive of Nassau County; that he knows the corporate seal of said County of Nassau; that the seal affixed to said instrument is such corporate seal; that it was thereto affixed pursuant to resolution of the Board of Supervisors.

Notary Public

Exhibit "V"

Exhibit A — Agreement

State of New York
County of Nassau

On this day of , 1970, before me personally came to me known, who, being by me duly sworn, did depose and say: That he resides at and that he is the President of The Patrolmen's Benevolent Association of the Police Department of the County of Nassau, Inc., the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

Notary Public

Exhibit B to Petition

(Letterhead of)

NEW YORK STATE POLICEMEN'S AND
FIREMEN'S RETIREMENT SYSTEM

Gov. Smith State Office Building, Albany, N.Y. 12225

Reg. No. A-10894

March 30, 1972

Joseph P. Weber
35 6th Avenue
Mineola, N.Y.

Dear Mr. Weber:

An audit of our retirement procedures has revealed that an error occurred in computing your final average salary in determining your retirement allowance. Accordingly, the Retirement System has been required to recalculate your allowance. In the future your monthly retirement benefit, under Option O, will be in the amount of $431.62.

Your March allowance check, reflecting this adjustment, will be forwarded under separate cover.

Very truly yours,

Leon Braun
Deputy State Comptroller
By: Philip M. Golding
Philip M. Golding
Director of Retirement
Accounts

PMG:G:pr

Exhibit W

Answer

STATE OF NEW YORK

SUPREME COURT — COUNTY OF ALBANY

(Same Title)

The respondent, in answer to the petition herein, by his attorney, Louis J. Lefkowitz, Attorney General of the State of New York:

FIRST: Admits the allegations set forth in the paragraphs of the petition numbered "1" through "4" inclusive, "6", "10", "11", "13", "14", "15", "18" and "19".

SECOND: Denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph "5".

THIRD: Denies each and every allegation set forth in paragraphs "7", "9", "12", "16", and "17".

FOURTH: Admits the allegations of paragraph "8", except denies that the petitioner is entitled to all the benefits contained within the contract set forth as Exhibit A.

AS AND FOR A FIRST SEPARATE AND COMPLETE AFFIRMATIVE DEFENSE AND OBJECTION IN POINT OF LAW, RESPONDENT ALLEGES:

FIFTH: That as appears in paragraph "4" of the petition, the contract between the County of Nassau and the Nassau County Patrolmen's Benevolent Association was executed by the County Executive and became binding upon the parties thereto on the 16th day of March, 1970.

Exhibit "W"

Answer

SIXTH: That as further appears by the petition, paragraph "8", the petitioner retired effective February 23, 1970, approximately three weeks before the execution of the contract aforesaid.

SEVENTH: That although the said contract was, by its terms, effective retroactively to January 1, 1970, that fact can create no new termination benefits for petitioner, who performed no active service in consideration of such prospective benefits.

EIGHTH: That upon information and belief, the contract in effect between the County of Nassau and the Patrolmen's Benevolent Association immediately prior to January 1, 1970 made no provision for the payment of termination pay.

NINTH: That accordingly, the payment of termination pay to petitioner and others similarly situated by the County of Nassau was without legal foundation and constitutes an illegal gift of public money.

AS AND FOR A SECOND SEPARATE AND COMPLETE AFFIRMATIVE DEFENSE AND OBJECTION IN POINT OF LAW:

TENTH: Respondent repeats and realleges the foregoing paragraphs of this answer numbered "FIFTH" and "EIGHTH".

ELEVENTH: That the payment of termination pay by the County, pursuant to the agreement executed by and between the County of Nassau and the Patrolmen's Benevolent Association on March 16, 1970, to any person who retired during the year 1970 was without consideration, and was an unconstitutional gift of public funds.

Exhibit "W"

Answer

TWELFTH: That accordingly, inclusion of the amounts so paid and the computation of the member's final average salary by the Retirement System during 1970 was without authority, and accordingly, respondent has undertaken to recalculate the allowances as paid.

AS AND FOR A PARTIAL AFFIRMATIVE DEFENSE AND OBJECTION IN POINT OF LAW, RESPONDENT ALLEGES:

THIRTEENTH: That as appears by the petition, paragraph "13", the retirement allowance paid to petitioner prior to March, 1972 was computed by including the full amount of termination pay received by him in his final average salary.

FOURTEENTH: That pending the adjudication of similar claims and defenses in *Matter of Lecci* v. *Levitt* now pending before this Court, respondent has recalculated the retirement allowance received by petitioner and others similarly situated on the basis of a final average salary which includes termination pay in the amount of three days for each of the three years upon which final average salary is based.

FIFTEENTH: That in any event, should it be determined that the payment of termination pay to petitioner was properly made, inclusion of such payment in the computation of final average salary is limited to the amount earned and deferred during the three-year period upon which final average salary is based.

Exhibit "W"

Answer

WHEREFORES, respondent respectfully prays for a judgment dismissing the petition, and for such other and further relief as to the Court may seem just and proper.

Dated: Albany, New York
May 3, 1972

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondent
Office & P.O. Address
The Capitol

(Verified on May 3, 1972). Albany, New York 12224

Exhibit X

Affidavit of Joseph P. Weber in Opposition to Petition

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

(Same Title)

JOSEPH P. WEBER, Petitioner herein, by his attorney, RICHARD HARTMAN, replying to the Respondent's answer, respectfully alleges:

1. It is contended "As and For a First Separate and Complete Affirmative Defense and Objection in Point of Law" by Respondent in his answer that since the contract between the County of Nassau and the Nassau County Patrolmen's Benevolent Association was executed on the 16th day of March, 1970, and Petitioner retired effective February 23, 1970, that the provision in said contract for payment of termination pay is not applicable to Petitioner since it would be without legal foundation and would therefore constitute an illegal gift of public money. Respondent's argument completely ignores the fact that the 1970 contract contained a provision making its effective date retroactive to January 1, 1970.

2. Respondent by taking such a position, totally ignores a decisive factor with regards to the issue at hand. According to Respondent's reasoning, the retroactive provision of said 1970 contract is to be totally ignored and given no weight or effect in direct contradiction to all legal precedents in the field of contract law. In particular, the Court's attention is directed to the case of *Matthews* v. *Jeremiah Burns, Inc. et al*, 129 N.Y.S. 2d 841 (1954) wherein the Court held that:

> "It's fundamental that where parties to an agreement expressly provide that a written contract be entered into 'as of' an earlier date than that on which it

was executed, the agreement is effective retroactive 'as of' the earlier date and the parties are bound thereby accordingly" (for additional authority see *Brewer* v. *National Surety Corp.*, 10 Cir., 169 F. 2d 926, 928; *Forest* v. *Mutual Benefit Life Insurance Company* 195 Misc. 12, 16-17, 86 N.Y.S. 2d 910, 913-915, affirmed 275 App. Div. 939, 89 N.Y.S. 2d 488.)

3. In addition to ignoring a material fact, Respondent is also inconsistent in his reasoning. Whereas Respondent attempts to claim that the 1970 employment contract betwen the County of Nassau and the Nassau County Patrolmen's Benevolent Association is not applicable to Petitioner since the contract was signed March 16, 1970 and Petitioner retired February 23, 1970, Respondent overlooks the fact that the Retirement System in computing Petitioner's retirement benefits based upon his "final average salary" acknowledged in computing said "final average salary" the increase in Petitioner's yearly salary base for the period of time applicable due to the 1970 contract provisions.

4. It should also be noted by the Court that termination pay, provided under a collective bargaining agreement between the County of Nassau and the Nassau County Patrolmen's Benevolent Association, has been determined to be earned compensation and not a constitutionally prohibited gift of public funds since the "inducement to enter and remain in public service, which pensions and other promised benefits promote, is valid consideration to the state and not within the constitutional ban." See *Lecci* v. *Nickerson*, 63 Misc. 2d 756 (1970), 313 N.Y.S. 2d 474.

5. In addition, it should also be noted that the County of Nassau, under the Taylor Law, can enter into binding

collective negotiations as to the terms and conditions of employment in the form of employee rights and benefits not otherwise authorized or prohibited by law. See *Lecci* v. *Nickerson* 63 Misc. 2d 756 (1970), 313 N.Y.S. 2d 474. For Respondent to take the position that termination pay is not the proper subject matter for collective bargaining between the County of Nassau and the Nassau County Patrolmen's Benevolent Association under the Taylor Law, results in having Respondent attempt to formulate a proposition that is unfounded in law and flies in the face of the holding in *Lecci* v. *Nickerson.*

6. Respondent contends "As an For a Second Separate and Complete Affirmative Defense and Objection in Point of Law" that payment of termination pay by the County of Nassau pursuant to the 1970 contract to any person who retired during the year 1970 was without consideration and is an unconstitutional gift of public funds and that the inclusion of the amounts so paid in the computation of a retiree's final average salary by the Retirement System during 1970, was without authority.

7. As stated previously, the Courts have recognized that termination pay provided under a collective bargaining agreement is not a constitutionally prohibited gift of public funds but rather is to be considered earned compensation and is properly the subject matter of a collective bargaining agreement between a municipality and its employees (See *Lecci* v. *Nickerson,* cited above).

8. In view of the holding that termination pay is not a gift of public funds and in view of the fact that Respondent heretofore acknowledged that the computation of Petitioner's "final average salary" included the full amount of termination pay received by Petitioner at the time of retirement, Respondent's actions in diminishing Petitioner's retirement benefits by recalculating Petitioner's "final

average salary" so as to exclude therefrom an amount representative of said termination pay earned and received upon retirement is an impairment of a retirement benefit heretofore paid to Petitioner and is in direct violation of Article V Section 7 of the New York State Constitution which specifically prohibits diminishing or impairing a pension benefit.

9. Respondent contends "As and or a Partial Affirmative Defense and Objection in Point of Law" that as an interim measure, pending the outcome of related litigation, that Petitioner's retirement allowance has been recalculated to reflect entitlements based upon a "final average salary" calculation that includes termination pay in the amount of three days pay per year for only three years of service.

10. Respondent, in so doing, tacitly acknowledges the fact that termination pay is properly includable in calculating Petitioner's "final average salary"; however, Respondent attempts to salvage his opposition to said conclusion by stating that Petitioner is only entitled to have included in said "final average salary" calculation a sum representative of termination pay benefits of three years rather than representative of his total number of years of actual service for which he was in fact paid.

11. To take such a position, Respondent overlooks the fact that Petitioner earned and was paid termination pay upon retirement based upon a computation of three days pay for every year of service and that entitlement to said termination pay was contingent upon his retirement in good standing. To attempt to fractionally reduce the lump sum amount earned and paid at the time of retirement, directly contradicts the language of Section 302, Subdivision 9 of the Retirement and Social Security Law of the State of New York as well as contradicts the constitu-

tional mandate of Article V, Section 7 of the New York State Constitution which prohibits the diminishing or impairment of any state pension or retirement benefit.

WHEREFORE, Petitioner asks that Respondent's answer be stricken and demands judgment against the Respondent directing the Respondent to refrain from recomputing Petitioner's "final average salary" with regards to redetermining his retirement allowance from the New York State Policemen's and Firemen's Retirement System, and for such other and further relief as to this Court may seem just and proper.

Dated: Mineola, New York
May 11, 1972

JOSEPH P. WEBER

(Verified on May 16, 1972.)

Exhibit Y

Memorandum Decision of Mr. Justice Casey

STATE OF NEW YORK SUPREME COURT

COUNTY OF ALBANY

(Same Title)

(Supreme Court Special Term, Albany County, May 12, 1972)

(*Justice* JOHN T. CASEY, Presiding)

Appearances:

RICHARD HARTMAN, ESQ.
Attorney for Petitioner
300 Old Country Road
Mineola, New York 11501

HON. LOUIS J. LEFKOWITZ
Attorney General
John Q. Driscoll, Esq., of counsel
Attorney for Respondent
The Capitol
Albany, New York

MEMORANDUM

CASEY, *J.*

In this Article 78 proceeding petitioner seeks a Judgment directing the respondent to refrain from recomputing petitioner's "final average salary" for the purpose of adjusting petitioner's retirement allowance.

The respondent, The Comptroller of the State of New York, is responsible for the administration of the New York State Policemen's and Firemen's Retirement System.

The facts are undisputed. Petitioner was a member of the Nassau County Police Department from February 15,

1950 until his retirement on February 23, 1970 and was a member of the New York State Policemen's and Firemen's Retirement System. On March 16, 1970 a contract between the Nassau County Patrolmen's Benevolent Association and Nassau County was signed. Sub-paragraph 7 (K) of that agreement provided:

> K. Termination Pay.
>
> Upon separation from service, after twenty (20) years, for any reason, other than cause, or upon the death in service of any employee, such employee or his legal representative, shall be entitled to cash payment for accumulated terminal leave computed on an entitlement basis of three (3) days for each year of completed service . . .

The contract was made retroactive and effective as of January 1, 1971.

When he retired petitioner received a lump sum cash payment for termination pay. When the petitioner retired, the respondent included the full amount of the lump sum cash payment received by petitioner in the amount respondent used to compute petitioner's "final average salary" for the purposes of determining the amount to be paid to petitioner as retirement pay. On March 30, 1972 respondent notified petitioner that he had erred in crediting petitioner with the full amount of his termination payment when respondent computed petitioner's "final average salary". Respondent then advised petitioner that he had recalculated the amount due. Petitioner claims his retirement allowance was reduced by approximately $35.00 per month as a result of the recalculation.

In opposition to the petition, the respondent claims that termination pay is not includable in determining peti-

tioner's "final average salary". This is so, according to respondent, because the termination payment made to petitioner constituted an unconstitutional gift of public funds. In the alternative, respondent argues that even if termination pay should be included, the amount is limited to the amount earned in the three year period upon which the "final average salary" is based.

Termination pay to public employees is not an unconstitutional gift of public funds. *Lecci* v. *Nickerson*, 63 Misc. 2d 756; *Kranker* v. *Levitt*, 30 N.Y.2d 574; *Local* 456 *International Brotherhood of Teamsters* v. *Cortlandt*, 68 Misc. 2d 645.

Furthermore, the fact the petitioner had retired prior to the execution of the collective bargaining agreement is immaterial. *Matthews* v. *Jeremiah Burns, Inc.*, 205 Misc. 1006. The agreement was made retroactive and effective prior to the retirement of the petitioner.

At that time the petitioner was an employee of the Police Department, and thus received all of the benefits conferred by the contract. Ibid. To hold otherwise would, in many cases, require the benefits received by any employee of the Police Department to be computed on the basis of that employee's time in service when the contract conferring the benefits was executed. Such a procedure would be cumbersome and unworkable. To ascertain the amount due to an individual as a retirement benefit, the respondent must compute his "final average salary". Subdivision 302 (9) (b) of the Retirement and Social Security Law defines "final average salary" as:

> In the case of a member having credit for three years or more of member service, such term [final average salary] shall mean the highest average *annual compensation earned* during any three consecutive years of member service for which he is credited . . . (emphasis added)

Memorandum Decision of Mr. Justice Casey

Annual compensation is defined in subdivision (2) (a) of that section as follows:

> a) The salary or wages annually earnable by a member . . . or any allowance in lieu thereof received by the member.

Thus, the petitioner is entitled to have the amount of money received for payment of the termination credits actually earned in the years which are to be used as the base for the computation of his "final average salary".

The termination pay was earned at a rate of three days per year of service. The payment of the amount so earned, however, was deferred or withheld until petitioner had satisfied the other requirements of sub-paragraph 7 (K) of the collective bargaining agreement. C.f., *Local* 456 *International Brotherhood of Teamsters* v. *Cortlandt*, supra. This being so, the respondent is correct in his contention that the amount of termination pay properly included in computing the "final average salary" is the amount actually earned by the petitioner in each of the three years from which the "final average salary" is determined. In petitioner's case he will have earned three days termination pay in each year of the three year period for a total of nine days termination pay.

The petitioner argues that respondent credited other employees of the Nassau County Police Department with credit for the full amount of termination pay when computing the employees' "final average salary". Respondent admits he did so but claims it was an error and that he has recomputed the final average salary of those employees. This action, according to the petitioner, brings the case within the rule laid down in *Kranker* v. *Levitt*, supra. I disagree. The error of the respondent, on the facts of the instant case, did not constitute a contract between the re-

spondent and members of the Policemen's and Firemen's Retirement System.

In the answering papers the respondent states he recomputed the "final average salary" of the petitioner by including the amount representing the termination pay actually earned during the three year period. Accordingly, the relief requested by the petitioner is denied.

Submit judgment.

Dated: Troy, New York
July 25, 1972.

Exhibit "Y"

5

Order Appealed From

At a Special Term of the Supreme Court of the State of New York, held in and for the County of Albany, in the County Courthouse, Albany, New York, on the 12th day of May, 1972.

Present:

HON. JOHN T. CASEY,
Justice.

(Same Title)

Petitioner having moved this Court by order to show cause dated and issued the 10th day of April, 1972 for an order prohibiting the respondent from recomputing petitioner's final average salary and redetermining his retirement allowance.

Now, on reading and filing the order to show cause aforesaid and the petition of Joseph P. Weber, verified the 9th day of April, 1972, on which it was granted, respondent's answer verified the 3rd day of May, 1972 and the reply of Joseph P. Weber verified the 11th day of May, 1972, and after hearing Richard Hartman, Esq., attorney for petitioner, in support of the petition, and Louis J. Lefkowitz, Attorney General of the State of New York (John Q. Driscoll, Esq., of counsel) attorney for respondent, in opposition thereto, it is hereby

ORDERED, ADJUDGED AND DECREED that the relief demanded in the petition be and the same hereby is denied and the petition dismissed without costs.

Dated: Troy, New York
August 11, 1972

ENTER:

s/ JOHN T. CASEY
Justice of the Supreme Court

Exhibit Z

Notice of Appeal

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF ALBANY

In the Matter of the Application of

JOSEPH P. WEBER

Individually and for others similarly situated,

Petitioner,

— against —

ARTHUR LEVITT, Comptroller of the State of New York and Administrator of the New York State Policemen's and Firemen's Retirement System,

Respondent.

SIRS:

PLEASE TAKE NOTICE that the above named Petitioner, Joseph P. Weber, Individually and for others similarly situated, hereby appeals to the Appellate Division of the New York Supreme Court, in and for the Third Department, from an Order entered in the above entitled action in favor of the above Respondent, Arthur Levitt, Comptroller of the State of New York and Administrator of the New York State Policemen's and Firemen's Retirement System, entered in the Office of the Clerk of the County of Albany, on the 16th day of August, 1972, and this appeal is taken from each and every part of said Order as well as the whole thereof.

Dated: Mineola, New York

August 23, 1972

Exhibit "z"

Notice of Appeal

Yours, Etc.

RICHARD HARTMAN, ESQ.
Attorney for Petitioner
Office & P.O. Address
300 Old Country Road
Mineola, New York 11501

To:

JOHN S. BARTLETT, JR.
County Clerk
County of Albany,
Albany, New York

HON. LOUIS J. LEFKOWITZ
Attorney General of the State of New York
Attorney for Respondent
The Capitol
Albany, New York

Exhibit AA

Order Appealed From.

At a Term of the Appellate Division of the Supreme Court of the State of New York, held in and for the Third Judicial Department at the Justice Building in the City of Albany, New York, commencing on the 9th day of April, 1973.

Present:

Hon. J. Clarence Herlihy,
Presiding Justice,
Hon. Louis M. Greenblott,
Hon. Lawrence H. Cooke,
Hon. T. Paul Kane,
Hon. Robert G. Main,
Associate Justices.

In the Matter

of

Joseph P. Weber on Behalf of Himself and All Others Similarly Situated,

Appellants,

against

Arthur Levitt, Comptroller of the State of New York and Administrator of the New York State Policemen's and Firemen's Retirement System,

Respondent.

Petitioner Joseph P. Weber, on behalf of himself and all others similarly situated, having appealed from a judgment of the Supreme Court of Albany County, entered on the 16th day of August, 1972, in the office of the Clerk of the County of Albany, dismissing the

Exhibit "AA"

Order Appealed From

petition, and said appeal having been presented during the above-stated Term of this Court, and having been argued by Richard Hartman, Esq., of counsel for appellant, and by John Q. Driscoll, Esq., of counsel for the respondent, and after due deliberation, the Court having rendered a decision on the 31st day of May, 1973 (Opinion per Greenblott, J.), it is hereby

ORDERED that the judgment appealed from be and the same is hereby affirmed without costs.

Dated and Entered: June 7, 1973

Enter:

/s/ JOHN J. O'BRIEN
Clerk

A True Copy
JOHN J. O'BRIEN
Clerk

Exhibit BB

Order Granting Leave to Appeal to the Court of Appeals.

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the eleventh day of October A. D. 1973.

Present,

Hon. Stanley H. Fuld, Chief Judge, presiding.

Mo. #654

In the Matter

of

The Application of Joseph P. Weber, Individually and for others similarly situated,

Petitioner,

vs.

Arthur Levitt, Comptroller of the State of New York and Administrator of the New York State Policemen's and Firemen's Retirement Systems,

Respondent.

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the petitioner herein and papers having been duly submitted thereon and due deliberation thereupon had:

Ordered, that the said motion be and the same hereby is granted.

A copy

JAMES M. FLAVIN
Clerk

(Seal.)

Exhibit CC

Fifth Amendment of the United States Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.

Section 1 of the 14th Amendment of the United States Constituti

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article V, Section 7 of the New York State Constitution

[Membership in retirement systems; benefits not to be diminished nor impaired.]

After July first, nineteen hundred forty, membership in any pension or retirement system of the state or of a civil division thereof shall be a contractual relationship, the benefits of which shall not be diminished or impaired. Adopted by Constitutional Convention of 1938; approved by the people Nov. 8, 1938.

Exhibit "CC"

Section 302 (9) of the Retirement and Social Security Law of the State of New York

9. "Final average salary."

a. The average annual compensation of a member for credited government service not exceeding his three years of credited government service immediately preceding his date of retirement.

b. In the case of a member having credit for three years or more of member service, such term shall mean his highest average annual compensation earned during any three consecutive years of member service for which he is credited, provided that a member by written request, filed with the comptroller prior to the effective date of retirement and in form satisfactory to the comptroller, may select any other period of three consecutive years of member service for which he is credited.

c. In the case of a member who:

(1) Served as a supervisor of a town when such town was not a participating employer, and

(2) Was paid for such services on a fee basis, and

(3) Upon the town's subsequently becoming a participating employer, has paid contributions to the policemen's and firemen's retirement system with respect to salary received for prior county services,

such term shall mean, at the option of such member, his average annual compensation, including such fees and salary, earned by him during any three consecutive years of service with such municipality selected by the applicant prior to the date of his retirement.

d. By the adoption, filing and approval, where required, of a resolution in the manner provided by section three hundred thirty or three hundred thirty-one of this chapter, as the case may be, a participating employer may elect to provide that "Final Average Salary" shall mean the regular compensation earned from such participating employer by a member during the twelve months of actual service immediately preceding the date of such employee's retirement, exclusive of any lump sum payments for sick leave, or accumulated vacation credit, or any form of termination pay; provided, however, if the compensation earned in said twelve months exceeds that of the previous twelve months by more than twenty percentum, the amount in excess of twenty percentum shall be excluded in the computation of final average salary; provided further, however, that the benefits computed pursuant to this paragraph shall be payable unless the member would otherwise be entitled to a greater benefit under other provisions of this subdivision, in which case such greater benefit shall be payable. The provisions of this paragraph shall apply only to employees of a participating employer who were such employees on or before June thirtieth, nineteen hundred seventy-three.

Section 431 of the Retirement and Social Security Law of the State of New York

In any retirement or pension plan to which the state or municipality thereof contributes, the salary base for the computation of retirement benefits shall in no event include any of the following earned or received, on or after April first, nineteen hundred seventy-two:

1. lump sum payments for deferred compensation, sick leave, accumulated vacation or other credits for time not worked,
2. any form of termination pay,
3. any additional compensation paid in anticipation of retirement, or
4. that portion of compensation earned during any twelve months included in such salary base period which exceeds that of the preceding twelve months by more than twenty per centum.

Added L.1971, c. 503, § 19, eff. June 17, 1971.